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# TRANSCRIPT OF RECORD.

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1915.**

**No. 201.**

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**SOUTHERN EXPRESS COMPANY, PLAINTIFF IN ERROR,**

**vs.**

**JOHN BYERS.**

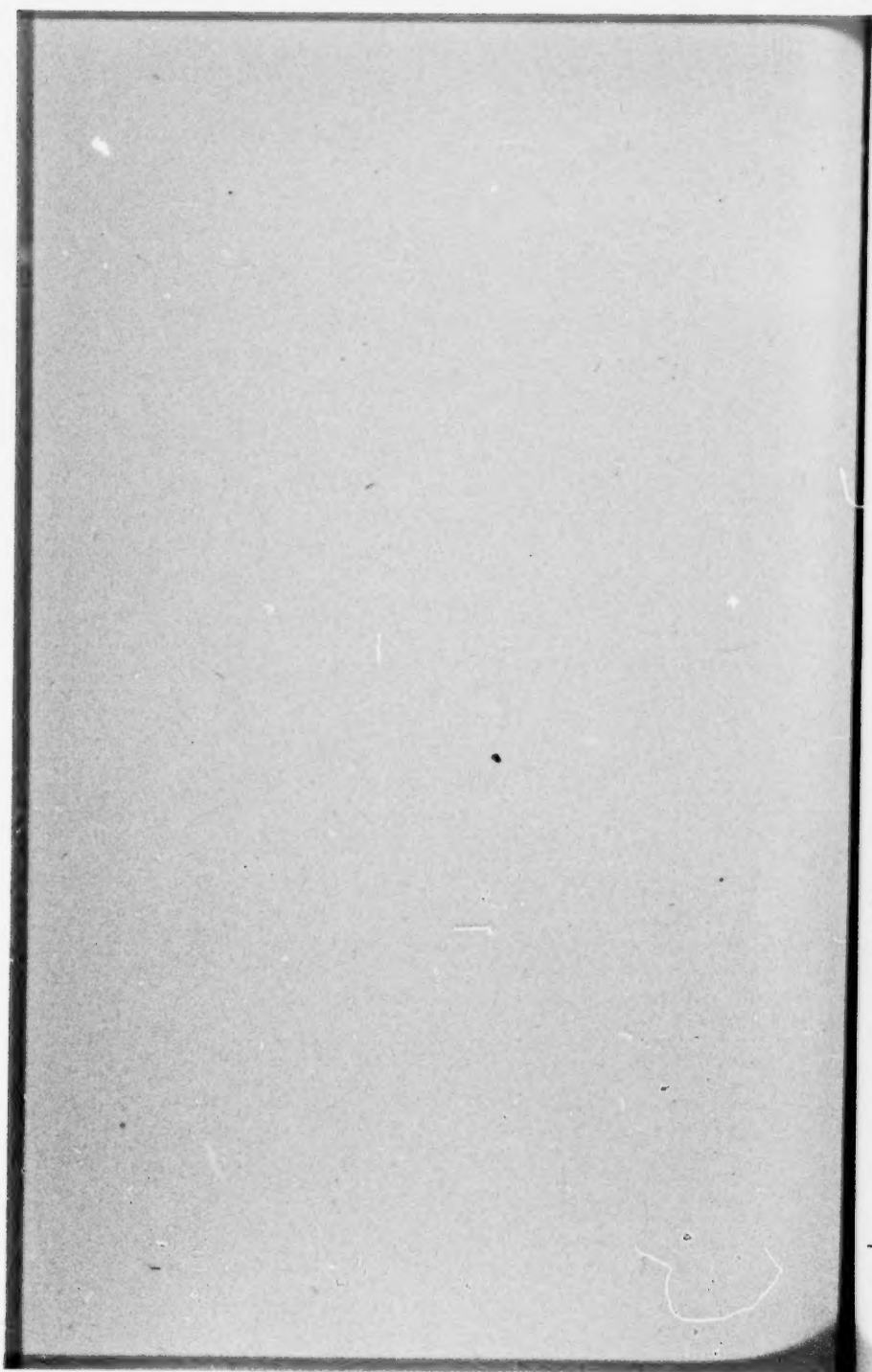
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**IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH  
CAROLINA.**

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**FILED JULY 9, 1914.**

**(24,307)**



(24,307)

SUPREME COURT OF THE UNITED STATES.

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vs.

JOHN BYERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH  
CAROLINA.

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1 Supreme Court of the United States, October Term, 1914.

No. —.

SOUTHERN EXPRESS COMPANY, Plaintiff in Error,

vs.

JOHN BYERS, Defendant in Error.

*Petition for Writ of Error.*

To the Honorable Chief Justice of the Supreme Court of North Carolina:

The petitioner, Southern Express Company, respectfully shows that at the August Term, 1913, of the Superior Court of Buncombe County, North Carolina, a court of general jurisdiction, a judgment was rendered against your petitioner in a certain cause therein pending, wherein John Byers was plaintiff and your Petitioner was defendant, for the sum of Two Hundred and Fifty (\$250.00) dollars damages and the costs of the action; that thereupon your petitioner appealed from said judgment to the Supreme Court of the State of North Carolina and that the Supreme Court of the State of North Carolina at its February Term, 1914, to-wit, on the fifth day of May, 1914, rendered a final judgment in said cause, affirming the judgment of the said Superior Court of the State of North Carolina, as will appear by reference to the record and proceedings in said cause; and that the said Supreme Court of North Carolina is the highest court of said State in which a decision in said suit could be had, and your petitioner claims the right to remove said cause to the Supreme Court of the United States by writ of error, under and by virtue of section 709 of the Revised Statutes of the United States and the other Statutes of said United States, because your petitioner claims that the cause of action set forth in the complaint of the defendant in error and the defense thereto, set up in the answer of the plaintiff in error, in the said State Court, shows that said cause of action and the defense thereto arose under the statutes of the United States, to-wit, the statutes regulating, governing and controlling interstate commerce in the United States, and usually referred to as the Hepburn Act and the Carmack Amendment; and, further, that the rights set up and claimed by your petitioner under said statutes were denied by the said Courts of the State of North Carolina as appears by the record of the proceedings in said cause, which is herewith submitted, and that the decision of the said Supreme Court of North Carolina denied your petitioner the construction of said United States statutes to which it was entitled in said cause, and the errors complained of on this petition are more fully set forth in the assignment of errors hereto attached.

Wherefore your Petitioner prays the allowance of the writ of error, returnable to the Supreme Court of the United States within thirty

days as prescribed by the rules practiced in the Supreme Court of said United States, at 1 for citation and supersedeas: and your petitioner will ever pray etc.

SOUTHERN EXPRESS COMPANY, *Petitioner*,  
By JULIUS C. MARTIN,  
THOS. S. ROLLINS,  
GEO. H. WRIGHT,  
*Attorneys for Petitioner.*

Let the writ issue as prayed. This 9th day of June 1914.

WALTER CLARK,  
*Chief Justice of Supreme Court of North Carolina.*

3 Supreme Court of United States, October Term, 1914.

No. —.

SOUTHERN EXPRESS COMPANY, Plaintiff in Error,  
vs.  
JOHN BYERS, Defendant in Error.

*Assignment of Errors.*

Now comes the Southern Express Company, Plaintiff in Error, and files herewith its petition for writ of error and says that there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reversed in the Supreme Court of the United States, makes the following assignments of error.

The Supreme Court of North Carolina erred in said above entitled cause as follows:

I.

For that the said Supreme Court of North Carolina held that the receipt given by the plaintiff in error to the defendant in error for the shipment mentioned in the complaint in this cause, in which plaintiff's damages and right of recovery were limited to fifty dollars, was not binding upon the said defendant in error and overruled the objection of the plaintiff in error to the testimony of the defendant in error, as follows:

"I was hardly able to attend to anything on account of the loss of my wife, and I had to do the best I could because I was broke down when I got down there and could not do anything."

"Q. Did you suffer in body and mind?"

"A. Yes, I suffered in mind and body a great deal."

The plaintiff in error insists that this testimony was incompetent and that damages for mental suffering cannot be recovered for delay of an interstate shipment, under the laws applicable thereto.

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## II.

For that the Supreme Court of North Carolina erred in overruling the Second Exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"A. I was affected on account of that and there was a great deal of talk down there about it and they interrupted me powerful about it, and I was hurt over my wife and about the casket not being there and I had a great many to be there and it bothered me terribly, I hardly knowed what to do.

"Q. You said that you were interrupted terribly about it, what do you mean by that?

"I was bothered about it not being there. I expected it to be there when I got there; that was what I meant.

"What did you mean when you told Mr. Martin that the only mental suffering you had was on account of your wife's death?"

This testimony was objected to upon the same ground as that mentioned in the First Assignment of Error, and plaintiff in error insists that the same was incompetent because its purpose and effect was to add to the defendant's liability as construed by the Supreme Court of North Carolina an additional liability beyond that contemplated by the receipt or bill of lading given by the plaintiff in error to the defendant in error at the date of said shipment.

## III.

For that the said Supreme Court of North Carolina erred in overruling the objection and exception of the plaintiff in error, number five, and in holding that the schedule of rates filed by the plaintiff in error with Interstate Commerce Commission as provided by the Acts of Congress, shewing rates of shipment between points in North Carolina and points in South Carolina, was incompetent.

5      The purpose of this evidence was to show that the plaintiff in error had complied with United States statutes in regard to interstate commerce and was entitled to the benefit of said statutes.

## IV.

For that the Supreme Court of North Carolina error in overruling the exception of the plaintiff in error to the action of the Court below in refusing the entering of a judgment as of non-suit in the cause, as set out in the Sixth Exception of the Defendant in error.

## V.

For that the said Supreme Court of North Carolina erred in overruling the Seventh Exception of the plaintiff in error to the submission of the issues set out in the record in this cause, and especially to the submission of the issue as to damages on account of mental anguish, set out in the record.

## VI.

For that the said Supreme Court of North Carolina erred in overruling the Eighth exception of the plaintiff in error, and in holding that the trial Court committed no error in refusing to give plaintiff in error's first request to charge the Jury as follows:

"1. It is undisputed that the shipment of the casket which it is alleged was delayed, was a shipment in interstate commerce; that is, a shipment from the State of North Carolina to the State of South Carolina. The plaintiff offered a bill of lading herein, containing a provision that the company should not be liable in any event for more than fifty dollars on said shipment. It is admitted that the defendant paid to the plaintiff the full value of the shipment alleged to have been delayed and that plaintiff's claims for damages for the value of the shipment have been settled. The Court therefore charges the jury that under the law governing this case the plaintiff is not entitled to recover any other or further damages, and directs the jury to render a verdict accordingly."

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## VII.

For that the said Supreme Court of North Carolina erred in overruling the ninth exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give plaintiff in error's second request to charge the jury as follows:

"2. As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damage claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the Court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover any such damage; the jury is therefore directed to render a verdict for the defendant."

## VIII.

For that the said Supreme Court of North Carolina erred in overruling the tenth exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give plaintiff in error's third request to charge the jury as follows:

"3. In no view of the evidence in this case is the plaintiff entitled to recover damage for mental suffering or mental anguish on account of the delay of the shipment mentioned in the complaint, and as this action was brought for such mental suffering and mental anguish only, the jury is instructed to render a verdict for the defendant."

## IX.

For that the said Supreme Court of North Carolina erred in overruling the eleventh exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give plaintiff in error's fourth request to charge the jury as follows:

"4. The defendant pleads and relies upon the Acts of Congress passed, regulating interstate commerce in this case and asks the court

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to instruct the jury that under the Acts of Congress regulating interstate commerce and particularly under the Hepburn Act, passed June 29, 1906, by the Congress of the United States, with its amendments, there is no liability on the defendant for the cause of action sued for in this case, and the jury are therefore instructed to render a verdict for the defendant".

### X.

For that the said Supreme Court of North Carolina erred in overruling the twelfth exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give the plaintiff in error's fifth request to charge the jury as follows:

"5. That attention of the Court is expressly called by the defendant to the Acts of Congress of the United States, regulating interstate commerce and said Acts are expressly relied on by the defendant as exempting it from any and all liability in this cause and the court is expressly requested to instruct the jury that in no view of the evidence in this case is the plaintiff entitled to recover damages for the cause of action alleged in the complaint."

### XI.

For that the said Supreme Court of North Carolina erred in overruling the thirteenth exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give plaintiff in error's sixth request to charge the jury as follows:

"6. That the decisions of the United States Court do not recognize the doctrine of mental anguish and that under the law governing this case the plaintiff is not entitled to recover any sum of money whatsoever for mental anguish or mental suffering, and the jury in rendering their verdict will not take into consideration any such alleged cause of action."

### XII.

For that *that* said Supreme Court of North Carolina erred in overruling the fourteenth exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's seventh request to charge the jury as follows:

"7. The bill of lading introduced by the plaintiff and issued by the defendant for the shipment mentioned in the complaint in this cause, contains this provision: 'The Company shall not be liable for loss, damage or detention of said property unless a claim therefor shall be presented in writing to its agent at destination office, verified by affidavit, accompanied by this contract, within ninety days from the date of the loss, damage, or detention of said shipment,' and the Court charges the jury that there is no evidence that any such claim was presented in writing to the defendant or its agent and for that reason the plaintiff is not entitled to maintain this action, and the jury is directed to render a verdict for the defendant."

## XIII.

For that the said Supreme Court of North Carolina erred in affirming the judgment of the Superior Court of Buncombe County, North Carolina, rendered against the plaintiff in error for the sum of two hundred and fifty dollars damages for the causes of action set forth in the complaint.

## XIV.

For that the said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial Court, set out in exception 23 of the  
9 plaintiff in error, and reading as follows:

"The Court charges you that if you come to the consideration of this third issue, that is, if you have answered the second issue 'Yes', that the defendant was negligent, if you come to the consideration of the third issue as to damages it becomes your duty to carefully distinguish between any suffering—any mental suffering, or mental anguish of the plaintiff which was the result of the death of his wife and her loss to him, and the mental anguish which he suffered as the direct consequence or proximate result of the failure of the casket and other property to arrive in time for this funeral."

## XV.

For that the said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial Court set out in exception 24 of the plaintiff in error, and reading as follows:

"In other words, it is the mental suffering that he endured, in addition to any suffering and outside of any suffering or distress which was sustained by him on account of the loss of his wife and his grief on that account."

## XVI.

For that the said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial Court set out in exception No. 25, and reading as follows:

"I charge you further on this third issue, if you come to its consideration, that it is not proper for you to allow any damages against this defendant in the nature of punishment of the defendant to be negligent in the respect alleged in the complaint, yet in this action it would not be proper for you to award any damages by way of punishment of the defendant."

## XVII.

For that said Supreme Court of North Carolina erred in  
10 overruling the exception of the plaintiff in error to that portion of the charge of the trial court set out in Exception No. 26 of the plaintiff in error and reading as follows:

"The only damages that are allowable, if you come to the consideration of this third issue, would be such as in your judgment would fairly and justly compensate this plaintiff for the mental anguish which he suffered as the natural, direct and proximate consequence of the negligence of the defendant."

## XVIII.

For that the said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial Court set out in Exception No. 27 of the plaintiff in error, and reading as follows:

"If you answer the third issue 'Yes', finding that the plaintiff suffered mental anguish, you will then proceed to allow as damages such amount as you may find would reasonably and justly compensate him for such mental anguish, as you may find under the evidence and the charge of the Court as I have delivered it to you."

For which errors the plaintiff in error, the Southern Express Company, prays that said judgment of the Supreme Court of North Carolina, dated the 5th day of May, 1914, be reversed and a judgment rendered in favor of the plaintiff in error and for costs.

JULIUS C. MARTIN,

THOS. S. ROLLINS,

GEO. H. WRIGHT,

*Counsel for Plaintiff in Error.*

11 UNITED STATES OF AMERICA, *vs.*:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Byers, plaintiff, and Southern Express Company, defendant, wherein was drawn in question the validity of a treaty or statute, of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, Southern Express Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in

this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the  
 12 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 9th day of June, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States District Court, Eastern Dist. of N. C., at Raleigh.]

ALEX. L. BLOW,  
*Clerk of the District Court of the United States  
 for Eastern District of North Carolina.*

Allowed by

WALTER CLARK,

*Chief Justice Supreme Court of North Carolina.*

Filed in Supreme Court North Carolina June 27, 1914.

J. L. SEAWELL, C. S. C.

13 [Endorsed:] Southern Express Company v. John Byers.  
 Writ of Error. Filed June 27, 1914, J. L. S. Martin, Rol-  
 lins & Wright, Attorneys and Counsellors at Law, Asheville, N. C.

14 UNITED STATES OF AMERICA, 88:

To John Byers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of North Carolina, wherein Southern Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter Clark Chief Justice Supreme Ct. of N. C. this 9 day of June, in the year of our Lord one thousand nine hundred and fourteen.

WALTER CLARK,  
*Chief Justice.*

[Seal of the Supreme Court of the State of North Carolina.]

Attest:—

J. L. SEAWELL,

*Clerk Supreme Court North Carolina.*



On this 26th day of June, in the year of our Lord one thousand nine hundred and fourteen, personally appeared before me, the subscriber, M. D. Justice and makes oath that he delivered a true copy of the within citation to John Byers, at Asheville, N. C. on June 25, 1914.

M. D. JUSTICE,  
*Deputy Marshal.*

Sworn to and subscribed the 26 day of June 1914.

[Seal O. K. Bennett, Notary Public, Buncombe County, N. C.]

O. K. BENNETT,  
*Notary Public.*

My commission expires Dec. 2, 1914.

Filed in Supreme Court North Carolina June 27, 1914.

J. L. SEAWELL, C. S. C.

Service of the foregoing citation is hereby accepted June 26th 1914.

MARK W. BROWN,  
*Att'y for John Byers.*

15 [Endorsed:] Southern Express Company v. John Byers. Citation on writ of error. West. Dist. North Carolina, office U. S. Marshal. Received Jun- 25, 1914. No. 2397, Asheville, N. C. Filed June 27, 1914. J. L. S. Martin, Rollins & Wright, Attorneys and Counsellors at Law, Asheville, N. C.

16 In the Supreme Court of North Carolina.

SOUTHERN EXPRESS COMPANY  
vs.  
JOHN BYERS.

*Supersedeas and Cost Bond.*

Know all men by these presents that we, Southern Express Company, a corporation organized under the laws of the State of Georgia, as Principal, and the American Surety Company of New York, as surety, are held and firmly bound unto John Byers, of the State of North Carolina, in the full sum of Five Hundred (\$500.00) Dollars, for the payment of which sum well and truly to be made we hereby jointly and severally bind ourselves and each of ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this the 6th day of June, in the year One Thousand Nine Hundred and fourteen.

Whereas, lately at a hearing had before the Supreme Court of North Carolina, a suit pending in said Court between said John Byers as plaintiff and the said Southern Express Company as defendant, a final judgment was rendered against the said Southern

Express Company, and the Southern Express Company seeks to prosecute a writ of error to the Supreme Court of the United States to reverse the said judgment;

Now, therefore, the condition of this obligation is such that if the Southern Express Company as plaintiff in error shall prosecute its said writ of error and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

SOUTHERN EXPRESS COMPANY,  
By J. C. MARTIN, *Att'y.*  
AMERICAN SURETY COMPANY  
OF NEW YORK,  
By P. R. ALLEN, *Vice-President.*

17

Attest:

JULIUS C. MARTIN,  
*Resident Assistant Secretary.*

The foregoing bond is approved and it is ordered that the same shall operate as supersedeas in the above entitled cause. This the 9th day of June, 1914.

WALTER CLARK,  
*Chief Justice of the Supreme Court  
of North Carolina.*

18 Be it remembered, that on the 7th day of June, 1912, a summons was issued out of the Superior Court of Buncombe County in the words and figures following:

*Summons for Relief.*

NORTH CAROLINA,  
*Buncombe County:*

In the Superior Court.

JOHN BYERS, Plaintiff,  
against  
SOUTHERN EXPRESS COMPANY.

The State of North Carolina to the Sheriff of Buncombe County,  
Greeting:

You are hereby commanded to summon Southern Express Company, the defendant above, if it be found within your county, to be and appear before the Judge of our Superior Court, at a court to be held for the County of Buncombe, at the court house in Asheville, North Carolina, on the sixth Monday before the first Monday of September, 1912, and answer the complaint which will be deposited in the office of the Clerk of the Superior Court of said county, within the first three days of said term, and let the said defendant take

notice that if it fail to answer to the said complaint within the time required by law, the plaintiff will apply to the Court for relief demanded in the complaint.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said court, this 7th day of June, 1912.

MARCUS ERWIN,  
*Clerk Superior Court, Buncombe County.*

Received June 10th, 1912. Served June 10th, 1912, by  
18¼ delivering a true copy of the within summons to J. T. James,  
an agent for the defendant, Southern Express Co.

C. F. WILLIAMS,  
*Sheriff Buncombe County.*

*Complaint.*

STATE OF NORTH CAROLINA,  
*County of Buncombe:*

In the Superior Court, August Term, 1912.

JOHN BYERS, Plaintiff,

vs.

SOUTHERN EXPRESS COMPANY, Defendant.

I.

That the plaintiff is now and has been for a number of years a resident of the County of Buncombe and State of North Carolina.

II.

That the defendant, Southern Express Company, is a corporation created by and existing under the laws of the State of Georgia, and at the times hereinafter mentioned was, and still is, engaged in doing a general express business and in transporting goods, wares and merchandise to, from and within the State of North Carolina, for hire, under and by virtue of the laws of said State.

III.

That on March 31st, 1912, the plaintiff's wife died at Hickory Grove, in the State of South Carolina, where she was then visiting her mother, Sarah Moore, and the plaintiff being desirous of giving his wife a proper and decent burial and of showing that respect and consideration which was her due, and of manifesting in such way as he was able, his great love and devotion for her, on April 1st, 1912, purchased in the city of Asheville a silver gray casket, robe, gloves, hose, and other articles necessary and proper in disposing of the body of his deceased wife, and at or about 9 o'clock a. m., on said date, delivered said casket and other articles

to the defendant, Southern Express Company, and said Southern Express Company, with knowledge of the character of said property, the purpose for which it was to be used and of the importance and necessity of a prompt and expeditious delivery thereof, entered into a contract with the plaintiff on said last mentioned date by which it accepted said casket and other articles for prompt and expeditious delivery to said Sarah Moore at Hickory Grove, in the State of South Carolina, and agreed to have said casket and other articles at Hickory Grove for delivery to said consignee by 9 o'clock p. m., on said date, provided the train should be on time, said train being scheduled to arrive at said place at 8:18 o'clock p. m.

#### IV.

That the defendant, Southern Express Company, in total disregard of its contract with the plaintiff as aforesaid and with reckless indifference to the rights of the plaintiff and of its duty to the public, and with knowledge that the ordinary and natural consequence of its breach of contract and duty as aforesaid would cause the plaintiff and other relatives of the deceased great injury to feelings and mental suffering, wrongfully, wilfully, recklessly and as a result of gross negligence, failed and omitted to expeditiously transport said casket and other articles to said Hickory Grove Station, either by said train running on said date or by trains running the following morning, whereby the plaintiff and other relatives of the deceased were greatly distressed in mind and body, the time and arrangements for the funeral services had to be changed, and plaintiff was humiliated and suffered much because another casket and other necessary articles for the decent and proper burial of his said wife could not be obtained, and it being found that the body of his said wife could not be held longer, was forced to the necessity of disposing of said deceased in a manner which did not show proper respect and consideration for her and caused great mortification and mental anguish to the plaintiff, to the plaintiff's damage, \$3,000.00.

Wherefore, the plaintiff prays judgment:

1. For the sum of \$3,000.00 as damages.
2. For the costs of this action to be taxed by the Clerk.
3. For such other and further relief as to the court shall seem proper and just.

MARK W. BROWN,

*Attorney for Plaintiff.*

STATE OF NORTH CAROLINA,  
*County of Buncombe.*

John Byers, the plaintiff above named, being first duly sworn, deposes and says:

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except

as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

JOHN (His X Mark) BYERS.

Sworn to and subscribed before me this the 7 day of September, 1912.

W. E. SHUFORD.

My commission expires the 8 day of June, 1913.

Filed September 7, 1912.

MARCUS ERWIN, *Clerk*,  
J. B. CAIN, *Deputy*.

20

*Answer.*

NORTH CAROLINA,  
*Buncombe County:*

Superior Court.

JOHN BYERS

vs.

SOUTHERN EXPRESS COMPANY.

The defendant above named, answering the complaint herein, says:

1.

That paragraph one of said complaint is admitted.

2.

That paragraph two of said complaint is admitted.

3.

That the allegations contained in paragraph three of said complaint are admitted, except so much thereof as alleges that the defendant "entered into a contract with the plaintiff on said last mentioned date by which it accepted said casket and other articles for prompt and expeditious delivery to said Sarah Moore, at Hickory Grove, in the State of South Carolina, and agreed to have said casket and other articles at Hickory Grove for delivery to said consignee by nine o'clock p. m. on said date, provided the train should be on time," and this is denied. But this defendant says that it did accept said property for shipment and undertook to ship the same and that it shipped the same over the route and by the train designated by the agent of the plaintiff when said shipment was delivered to the defendant.

4.

That the allegations contained in paragraph four of said complaint are denied.

21

*Relief.*

Wherefore, the defendant demands judgment that it go hence without day and recover its costs.

MARTIN, ROLLINS & WRIGHT,  
*Attorneys for Defendant.*

NORTH CAROLINA,  
*Buncombe County:*

J. T. James, being duly sworn, says that he is agent of Southern Express Company at Asheville, North Carolina; that he has read the foregoing answer and knows its contents; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

J. T. JAMES.

Sworn to and subscribed before me this October 15, 1912.

M. ERWIN, *C. S. C.*,  
Per J. B. CAIN, *D. C.*

Filed October 15, 1912.

MARCUS ERWIN, *Clerk.*  
J. B. CAIN, *Deputy.*

*Amended Answer.*

NORTH CAROLINA,  
*Buncombe County:*

In the Superior Court.

JOHN BYERS

vs.

SOUTHERN EXPRESS COMPANY.

The defendant, Southern Express Company, amending its answer heretofore filed in this cause, by leave of the Court, further answering, says:

22 That at the time of the occurrence mentioned in the complaint in this cause and ever since, the defendant was engaged in interstate commerce, receiving and shipping goods and merchandise in such commerce; that the casket mentioned in the complaint was delivered to the defendant at Asheville, North Carolina, to be shipped to Hickory Grove, in the State of South Carolina, and was so shipped by the defendant. That the defendant in obedience to the Act of Congress of June 29, 1906, and the amendments thereto, had filed with the Interstate Commerce Commission, schedules showing its rates and charges from Asheville, North Carolina, to said Hickory Grove, in South Carolina, in accordance with the provisions of said Act of Congress and the amendments thereto; that at the time said casket was received for shipment the

defendant issued to the plaintiff a bill of lading therefor as prescribed by said Act of Congress, in which it was set forth and agreed that the defendant's liability in no event should exceed the sum of Fifty (\$50.00) Dollars on account of loss or damage to said shipment, or delay in delivering the same; that the defendant has heretofore paid to the plaintiff all of his loss, cost and damage actually incurred by him on account of said shipment, having paid to the plaintiff the full amount which the plaintiff had previously paid for the casket and the other things contained in said shipment. That as this defendant is advised and believes, it is in no way liable to the plaintiff for any other or further damage in this cause and especially that under the laws of the United States, to-wit, the said Act of June 20, 1906, usually known as the Hepburn Act, with the amendments thereto, this defendant is not in any manner liable to the plaintiff for such damages as those alleged in the plaintiff's complaint and this defendant hereby pleads the said Act of Congress regulating interstate commerce, and relies upon the same as a defense in this action, and as a bar to any right of the plaintiff to recover any other or further damage in this or any other action on account of said shipment in interstate commerce.

Wherefore, the defendant demands judgment that it go hence without day and recover its costs.

MARTIN, ROLLINS & WRIGHT.

NORTH CAROLINA,

*Buncombe County:*

R. L. Deweese, being duly sworn, deposes and says that he is agent of the Southern Express Company at Salisbury, North Carolina; that he has read the foregoing amended answer and knows its contents; that the same is true of his own knowledge except as to matters therein stated on information and belief, and that as to those matters he believes it to be true.

R. L. DEWEESE.

Sworn to and subscribed before me this 18 day of August, 1913.

M. ERWIN, C. S. C.,  
Per J. B. CAIN, D. C.

Filed August 18, 1913, by leave of Court.

M. ERWIN, C. S. C.,  
Per J. B. CAIN, D. C.

Be it remembered, that a regular term of the Superior Court for the County of Buncombe for the trial of civil cases exclusively, was opened and held in the court house in the city of Asheville on the 3d Monday before the 1st Monday in September, the same being Monday, August 11th, 1913:

Present, presiding and holding said court, Hon. Stephen C. Bragaw, Judge of the 1st Judicial District, by virtue of a commission issued by Locke Craig, Governor of the State of North Carolina when and where the following business was transacted:

JOHN BYERS  
vs.  
SOUTHERN EXPRESS COMPANY.

To try the issues herein joined comes the following jury of good and lawful men, to-wit: C. J. Reed and eleven others, who, being duly sworn and impaneled, for their verdict say:

*Issues.*

STATE OF NORTH CAROLINA,  
*Buncombe County:*

In the Superior Court, August Term, 1913.

JOHN BYERS  
vs.  
SOUTHERN EXPRESS COMPANY.

1.

Did the defendant, Southern Express Company, receive from the plaintiff the casket and other property for transportation from Asheville, N. C., to Hickory Grove, S. C., with the knowledge that said casket and other property were to be used in burying the plaintiff's wife, and with notice of the necessity for an expeditious delivery thereof?

Answer: Yes.

2.

Did the defendant negligently fail to expeditiously transport said casket and other property to Hickory Grove, S. C.?

Answer: Yes.

25

3.

What damages, if any, has plaintiff sustained on account of mental anguish caused by the negligence of the defendant?

Answer: \$250.00.

*Judgment.*

STATE OF NORTH CAROLINA,  
*Buncombe County:*

In the Superior Court, August Term, 1913.

JOHN BYERS, Plaintiff,  
vs.  
SOUTHERN EXPRESS COMPANY, Defendant.

This cause coming on to be heard before his Honor, Stephen C. Bragaw, and a jury, at this term, and the jury having answered the issues as appears in the record:



It is now, on motion of Mark W. Brown, attorney for the plaintiff, Ordered and adjudged that the plaintiff, John Byers, have a recovery of the defendant, Southern Express Company, to the sum of two hundred and fifty (\$250.00) dollars, and the costs of this action, to be taxed by the Clerk.

STEPHEN C. BRAGAW,  
*Judge Presiding.*

Motion by defendant to set aside verdict and for a new trial. Motion overruled and defendant excepts. Judgment and defendant excepts in open court appeals to Supreme Court. Notice waived. Appeal bond fixed at \$50.00. Defendant allowed 30 days in  
26 which to state and serve case on appeal and plaintiff 30 days thereafter to file counter case or exceptions.

*Statement of Case on Appeal.*

NORTH CAROLINA,  
*Buncombe County:*

In the Superior Court, October Term, 1913.

JOHN BYERS  
vs.  
SOUTHERN EXPRESS COMPANY.

This was a civil action tried before his Honor, Stephen C. Bragaw, Judge, and a jury, at the August Term, 1913, of the Superior Court of Buncombe County. The jury rendered a verdict for the plaintiff as set out in the record. Judgment was rendered for the plaintiff and the defendant appealed to the Supreme Court.

All of the testimony introduced on the trial material to the exceptions taken herein is as follows:

The plaintiff introduced the deposition of D. J. Wilson, taken in Savannah, Georgia, who testified: That he was 27 years of age, and resided in Savannah, Ga.; that he was in Asheville, N. C., April 1, 1912, when John Byers purchased from Peoples Undertaking Establishment of Asheville a casket, box, robe, gloves and hose to be used in burying his wife at Hickory Grove, S. C.; that he was the embalmer at the Peoples Undertaking Establishment at Asheville at the time of the death of the wife of John Byers; that the casket and other articles purchased by the plaintiff from the undertaking establishment were delivered to the Southern Express Company's office at the depot in Asheville; that the witness carried the casket down in the morning early to catch the first train, the Carolina  
27 Special, and after getting there he found that that train did not take any express; that the agent of the Southern Express Company promised to ship the casket on the next train which was 4:10, and that it would be delivered that night or early next morning; that witness told the agent that it was necessary for him to have

this casket there in time because the funeral was the next morning; that the agent promised faithfully that he would do so; that the agent promised to have the shipment there at the time specified, and that the witness got a receipt for the same.

The witness further testified that if the casket did not reach destination that night he would guarantee it would be there early next morning in plenty of time for the funeral.

That the following be added to the narrative statement of the testimony of the witness, Wilson: "The witness further testifies that if the train with which the 4:10 train made connection was on time, the casket would reach its destination the same night."

The original receipt given by the Southern Express Company at Asheville, N. C., for the casket and other articles referred to in the complaint, to John Byers, dated April 1, 1912, and reading as follows:

Southern Express Company.

ASHEVILLE, N. C., 4-1, 1912.

Received from John Byer.

Article—Box.

Value Declared by Shipper—Not given.

Said to Contain—Cskt. in.

Marked—Sarah Moore, Hickory Grove, S. C.

And on which valuation and classification the company's charges are made, which the company undertakes to carry, but not beyond its own lines, subject to the following conditions, and which are expressly agreed to by the shipper or owner in accepting this receipt:

28 1. In consideration of the rate charged for carrying said property which is regulated by the value and classification thereof and is based upon a valuation of not exceeding fifty dollars for any shipment of one hundred pounds or less, and not exceeding fifty cents per pound for any shipment in excess of one hundred pounds, unless a greater value is declared at time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars (\$50) on any shipment of one hundred pounds or less, and for not exceeding fifty cents per pound on a shipment weighing more than one hundred pounds, and said property is valued at, and the liability of this company is hereby limited to, the value above stated, unless a greater value is declared at the time of shipment, and the charge for value paid or agreed to be paid therefor; and in case of partial loss or damage the company shall not be liable for more than such proportion of the same as \$50 if one hundred pounds or less in weight, or fifty cents per pound if weight exceeds one hundred pounds, or the value declared bears to the actual value if greater.

If the said property is offered for shipment under the special rates named in Sections "D" and "E" of the existing Official Express Classification, it is agreed that the value of the same does not exceed

ten dollars (\$10) per package, said rates not applying on packages of greater value.

2. If the point of destination which is named by the shipper is not on the company's lines, it will deliver the shipment to its next connecting carrier to be forwarded under the rules and regulations of, and subject to the conditions prescribed by said connecting carrier; and in so delivering the same the company shall act only as shipper's agent. If shipper has advanced the charges thereon to such destination, the money so advanced in excess of this company's charges is accepted for the convenience and as the agent of shipper, and as such agent the company will turn same over to the connecting carrier in payment of charges to destination.

If the said point of destination be one at which this company maintains no agency, it will carry the shipment to its agency nearest or most convenient thereto, and mail, postage prepaid, a notice to the consignee, and the depositing of said notice in the postoffice shall be a full discharge of the obligation of this contract; this company will not be liable for loss or damage occurring after such property has been tendered to a connecting carrier, nor shall it be liable for any default or negligence of any person, corporation or association to whom said property may be delivered by it for the performance of any act or duty in respect thereto.

3. This company shall not be required to make free delivery at points where it maintains no free delivery service, nor at any point beyond its established delivery limits.

4. The company, unless grossly negligent, shall not be liable for loss or damage or delay to said property caused by quarantine or customs regulations, strikes, riots or perils of navigation, fire, steam, the act of God, heat, cold, wet or decay nor for the escape or injury or death of live animals, birds or fowls; nor for loss or damage to said property caused by any person acting as an officer of the law, whether with or without lawful process, warrant or authority, it being agreed that this shipment may be delivered to any person demanding the same under the color of the law; nor will it be liable for loss, damage or detention caused by the dangers or delays of railroad transportation, the perils of navigation, or the changes of temperature.

5. If this shipment be carried over any ocean or river routes the regular bill of lading of any steamship or steamboat company to which the same may be delivered shall define the Express Company's liability with respect to such ocean or river transportation; it is further agreed that the laws of the United States of America defining and limiting the liability of such ocean and river transportation companies shall apply to this shipment.

The said property being packed, secured and addressed by the shipper, the company shall not be liable for any delay or damage to the same resulting from improper or insufficient packing, securing or marking, nor shall the said company be liable for any damages to fragile articles, or articles consisting wholly or in part of, or contained in glass or chinaware, unless the same be marked, described and accepted as such herein and additional compensation paid or agreed to be paid therefor. If there is any discrepancy between

markings on this receipt and on the parcel, the latter shall be controlling.

6. The shipper waives notice of the failure of the consignee to receive and receipt for this shipment. Unless otherwise expressly declared herein the shipper represents that this shipment contains merchandise only, and does not contain money, specie, bonds, coupons or other negotiable paper or jewelry or other matter of extraordinary value. This company accepts such shipments only when the contents are expressly declared to it.

7. The company shall not be liable for loss damage or detention of said property unless a claim therefor shall be presented in writing to its agent at destination office, verified by affidavit accompanied by this contract within ninety days from the date of the loss, damage or detention of said shipment. This provision is not subject to waiver except by a special writing duly entered into for that express purpose. Nor shall the company be liable in any suit to recover for the loss, damage or detention of this shipment unless the same be commenced within one year thereafter.

8. The carrier or person liable on account of loss or damage to any of the said property shall be subrogated to any insurance that may have been effected upon said property.

9. If any C. O. D. is not paid by the consignee within thirty days from the date hereof, it is agreed that the company may, at its option, return the said property to shipper, who shall pay charges for transportation both ways, and the liability thereon of the company shall be only that of warehouseman, except during the actual transportation thereof.

10. No negligence shall be presumed against the company upon proof of loss, damage or detention of this shipment, but the burden of proving the facts constituting such negligence shall be upon the person who asserts it.

If this shipment be addressed in care of any person, the duty of this company in reference thereto shall end upon delivery to said person; if it be so addressed to another carrier for carriage to a further destination, and if the charges to final destination have been prepaid, the duty of this company in reference thereto shall end upon delivery to such carrier and accounting thereto for the unconsumed part of said prepay.

11. The terms and conditions of this contract shall apply to any forwarding or return of said property, and shall inure to the benefit of every carrier to whom the same may be entrusted.

12. In the event this shipment is perishable and the consignee fails to accept the same, or cannot be found at the address given, the company may sell the same at public or private sale, any law or custom to the contrary notwithstanding, and apply the proceeds to the payment of the transportation charges thereon and expenses of sale, and remit the balance to the consignor or hold the same for the benefit of the consignee or his order.

For the Company, DEWEESE.

Charges paid—\$2.07.

JOHN BYERS, the plaintiff, testified in his own behalf as follows: That he was about 50 years of age; that he was not a slavery darkey, but was born right after the war; that he had lived in Asheville fifteen years; that his wife died March 31, 1912, at Hickory Grove, South Carolina, while visiting her mother Sarah Moore; that he was notified of his wife's death and did not have much money; that it was Sunday and his wife was insured, and he had to wait until Monday morning to fix up about the insurance money; that it was necessary for him to stay over trying to see the insurance people as he had no money and that they fixed it up Monday morning and he borrowed a little money and bought a casket and hose and shroud and gloves from Noah Murrough, who said he would ship the things that morning on the ten o'clock train; that Wilson came back and told plaintiff that he had asked for the casket to go on the ten o'clock train and that the man said "no" and that Wilson then asked "what train goes next?" and the man said "four o'clock" that evening, and that the man said it would go that night, but that they would get it next morning by nine o'clock; that a person leaving Asheville on the 4:10 train in the afternoon would arrive at Hickory Grove a little after 9 o'clock that night if the train was on time. That he had been down there several times. That the train that left at 4:10 in the afternoon he thought carried express; that you could go to Hickory Grove without going by Spartanburg, South Carolina; you could go by Marion, North Carolina, and that would put you in Hickory Grove about the same time; that the train by Marion carries express; that Wilson said if the casket did not get there that night it would get there next morning; that the witness left Asheville on Monday night, went by way of Spartanburg and went down on the nine o'clock train next morning; that when he arrived at Hickory Grove he inquired of the express agent if the casket had arrived and was told it had not come; that there was another train passed Hickory Grove that afternoon about two o'clock, but the agent said nothing to him about the casket having arrived; that his wife's funeral was fixed at about four or five o'clock that afternoon; that previously the hour for the funeral had been fixed at eleven o'clock; that when the casket did not arrive they changed the hour of the funeral to four o'clock in the afternoon and there was a white gentleman there that stood for him and he got a very cheap casket and he had no clothes or nothing for his wife, and that it would not do to hold the body any longer as he had told them not to prepare anything and they had nothing there prepared for the body; that he had no decent clothes for her at all; that she died on Sunday and it was Tuesday and he had no way to embalm the body; that he bought a casket at Hickory Grove; that when the hour for the funeral arrived the friends gathered in for the funeral; that he explained to friends why the funeral did not take place. Witness was then asked the following question: "How were you affected when you got down there and found that the casket was not down there?"

## Exception No. 1.

The defendant objected to this question upon the ground that the plaintiff was bound by the terms of the receipt which the law  
321½ required the express company to give for the shipment. The objection was overruled and the defendant excepted. The witness then answered: "I was hardly able to attend to anything on account of the loss of my wife and I had to do the best I could because I was kinder broke down when I got down there and could not do anything. Q. Did you suffer in mind and body? A. Yes, I suffered in mind and body a great deal."

On cross-examination the witness further testified that his wife had rather lost her health and he had sent her down south to rest; that she had been south a few months; that the train leaving at 4:10 went by Spartanburg and there you changed trains and went over to Blacksburg where you changed again and went on down the Three C's Road to Hickory Grove; that he did not know what time the casket arrived at Hickory Grove; that he learned that it came there Wednesday morning and his wife had been buried the day before; that the Southern Express Company paid him for all the money he had paid out on the casket and other things contained in the shipment, but did not pay him anything for damages; that he was distressed when he heard his wife was dead, very much; that he suffered mental distress on that account; that his suffering was attributable to his wife's death; there was nothing else that he suffered about; the loss of his wife was a blow to him; that he had a white friend that bought the coffin for him and she was buried that same afternoon; that the coffin was bought at Hickory Grove in South Carolina; that he did not select the casket; that some friends went after it; that it did not suit him, but he had to take it as he did not have any money; that he could not have bought a nice coffin at Hickory Grove.

Being further examined, the witness testified as follows:  
33 "Q. Please state how you were affected because of the failure of this casket, hose and other things that you were to use to bury your wife to arrive in time for the funeral?"

## Exception No. 2.

The defendant objected to this question and the objection was overruled and the defendant excepted. The witness then answered: "A. I was affected on account of that and there was a great deal of talk down there about it and they interrupted me powerful about it, and I was hurt over my wife and about the casket not being there and I had a great many to be there and it bothered me terribly, I hardly knowed what to do. Q. You said that you were interrupted terribly about it, what do you mean by that? A. I was bothered about it not being there. I expected it to be there when I got there; that was what I meant. Q. What did you mean when you told Mr. Martin that the only mental suffering you had was on account of your wife's death?"

## Exception No. 3.

The defendant objected to this question: objection overruled and the defendant excepted. The witness then answered: "I did not have anything to suffer about only her; I was most sick myself after I heard of her death so sudden, it hurt me so bad. I did not have anything else to suffer about, that was all I meant. Q. Did you suffer any on account of the casket?

A. Yes."

The plaintiff was then asked the following question and the following colloquy took place between court and counsel: "What did that express man say to you when he came over to see you, what did he come about?" (This question was objected to by defendant).

The COURT: You gentlemen do not claim that you settled anything that is covered by this complaint?

34 Mr. MARTIN: No, your Honor, we do not claim that we paid anything for mental suffering.

The COURT: You do not claim that he has any claim for mental suffering?

Mr. BROWN: Yes, your Honor, you will find that the receipt excepts the claim for damages.

The COURT: I will let the question be excluded.

The witness further testified that he had seen the train that left Asheville at 4:10 in the afternoon carry express and he had seen No. 12 that goes by Marion carrying express.

## Exception No. 4.

The defendant moved the court to dismiss the action and for judgment as of non-suit. Motion overruled and defendant excepted.

The defendant offered the following testimony:

A receipt from Mark W. Brown, attorney, for John Byers, dated June 24, 1912, for the sum of \$64.17, reading as follows:

"June 24, 1912,

"113406-Asheville, N. C.

"Received at Asheville, N. C., on May 25, 1912, Sixty-Four and seventeen hundredths (\$64.17) Dollars, said amount being in full payment for one coffin delivered to Southern Express Company at Asheville, N. C., on April 1st, 1912, by John Byers, to be shipped to Sarah Moore, Hickory Grove, South Carolina. \$64.17.

("Coffin returned from Hickory Grove, S. C., and sold to Peoples Undertaking Co., Noah Murrough, manager, May 13th, 1912, for \$15.00, as per 'Report of Sale' attached, reducing this claim to \$49.17.

"Asheville, N. C., to Hickory Grove, S. C. W.-B. 10 Apr. 1, '12.

34 1/4 Shipment casket, Sarah Moore from Jno. Byers. This casket was misrouted from Asheville, N. C., by Transfer Clerk De-weese and was refused on account of arriving at destination too late for the funeral. Same was returned to Asheville and sold

to Peoples Undertaking Co. for \$15.00. Claim was paid for \$64.17 covering full value of the coffin.)

"MARK W. BROWN,  
"Att'y for John Byers, Claimant.

"Witness:

"J. T. JAMES,

"Agent So. Ex. Company."

NOTE.—The paragraphs in receipt in brackets were written in after same was signed by plaintiff's attorney.

R. L. DEWEESE testified that he lived at Salisbury and in April, 1912, he was working for the Southern Express Company at Asheville, and was transfer clerk at the railroad station; that he remembered the shipment of the casket in question; that before 12 o'clock in the morning of that date some one came to the depot, he did not remember the name, and had a casket to ship to Hickory Grove. A man came in and said that there was a woman dead down there and he wanted to get it off as soon as possible, and he explained to him that the first train would be 4:10 that afternoon and he said that would be all right to ship it on the 4:10; that the party to whom the coffin belonged was going on the 8 o'clock train and he told him he would ship it on the 4:10 train and it would get there the next day; that witness did not specify the time; that was about the conversation that occurred between them; that the casket was shipped on the 4:10 train that afternoon, which was the first train going towards Spartanburg that carried express; that the Carolina Special did not carry express; that he put the casket on the train; that the man in charge of the casket was a colored man; that he did not say much about the funeral, but the things he said was that he brought the casket to the station for another man 34½ and that that man intended to leave that night at 8 o'clock on the 8 o'clock train; that he did not talk to any other person about the shipment; that he did not guarantee that the casket would be delivered at 9 o'clock next morning or at 9 o'clock that night; that he did not know when it would be delivered; that it was shipped by the regular route; that he did not promise that it would be delivered the next morning or guarantee it.

On cross-examination the witness testified that he had been connected with the Express Company eight years and six months; that he told the man who brought the casket to the station that he would ship it on the next train at 4:10; that the man told him the casket was for a man who wanted to bury his wife the next day; that he knew the casket was wanted the next day; that the casket leaving Asheville at 4:10 would arrive at Hickory Grove the next day in the afternoon, but witness did not know exactly what hour; that it would not arrive there at 9:30 that night, that it would arrive in Spartanburg about 8 o'clock; that the trains between Spartanburg and Blacksburg did not carry express for Blacksburg; that express for Hickory Grove was shipped out on the 4:10 train at Asheville to Columbia, and out from Columbia next day to Hickory Grove; that he did not misroute the shipment; that the shipment was not



misrouted; that it could be routed two or three different ways; that it could have left Asheville on No. 12 by Marion; that he could not state what time it would have arrived if shipped on No. 12; that the shipment could have gone to Spartanburg and caught No. 12 the next day out of Spartanburg, but that would have put it late in the afternoon out of Blacksburg; going down there it makes connection at Blacksburg for Hickory Grove; that there are about eight trains each way from Spartanburg; that No. 40, the train that No. 10 connected with, left Spartanburg about eight o'clock; that No. 35 12 left Spartanburg in the afternoon; that No. 40 did not carry local express from Blacksburg and points south; that the agent could tell what time an express shipment would leave, but could not tell what time it would arrive at its destination; that the way the shipment was routed it ought to have arrived at Hickory Grove in the afternoon of the next day; that the train left Columbia in the morning and got to Hickory Grove in the afternoon, which was about 100 miles distant; that it was about as far from Columbia to Hickory Grove as it was from Asheville to Hickory Grove; that he told the man who brought the casket to the station that the next train that express was sent on for Hickory Grove was the train leaving at 4:10 in the afternoon; that his rule was that express for Hickory Grove should be sent by Columbia, S. C., but did not know rule of the company; that if the shipment had left on No. 12 at 2:25 in the afternoon it would have reached Marion, N. C., about 4 in the afternoon; that No. 12 did not leave Asheville on that day until three o'clock; that the train that left Marion for Hickory Grove carried a small car with it, baggage and express—a combination car; that No. 12 which left Asheville would make connection with the train going south from Marion between 4 and 5 o'clock if on time; that if the train left Marion on time going south and No. 12 was 35 minutes late, connection would likely be missed; that he routed that shipment of express over the line designated by the shipper and that it was the most expeditious route for the shipment and the route that the Express Company used; that he was transfer clerk and routed the express delivered at the station.

The defendant then offered in evidence its schedule of rates filed with the Interstate Commerce Commission, as provided by the Act of Congress, showing rates between points in North Carolina and points in South Carolina, and proved that it was the schedule 36 of rates in effect at and before the shipment mentioned in this case.

#### Exception No. 5.

To the admission of this schedule of rates plaintiff objected; objection was sustained and the defendant excepted.

The plaintiff then offered the following additional testimony:

JAMES H. WOOD testified that No. 12 left Asheville daily according to schedule at 2:25 and arrived at Marion at 4:10; that according to schedule the train between Marion and Hickory Grove left Marion at 4:15 and arrived at Hickory Grove at 8:06 p. m.; that it was a rule to hold train at Marion for Hickory Grove but did not

know how long; that from Asheville to Hickory Grove by way of Columbia was approximately 300 miles; that from Asheville to Hickory Grove by Spartanburg and Blacksburg it was about 112 miles; that from Asheville to Hickory Grove by Marion it was 124 miles.

The witness then explained the number of trains running between Spartanburg and Blacksburg, but stated he did not know how many of them carried express; that many of the trains of the Southern Railway Company did not carry express; but he did know that train 36 carried express north of Salisbury, but he did not know whether it carried express south of Salisbury; that train 36 leaves Spartanburg at 7:30 a. m., and arrives at Blacksburg at 8:33 a. m.; that train 114 leaves Blacksburg at 9:05 a. m., and arrives at Hickory Grove at 9:37 a. m.; that the only connection from Asheville to Hickory Grove via Columbia is to leave Asheville at 4:10 p. m.; arrive at Columbia at 11:40 p. m.; leave Columbia at 6:05 a. m., and arrive at Hickory Grove at 5:25 p. m.

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Exception No. 6.

At the conclusion of the testimony the defendant renewed its motion for judgment as of non-suit under the Hinsdale Act. Motion overruled and the defendant excepted.

Exception No. 7.

The court thereupon settled the issues as appear in the record and submitted the same to the jury, and the defendant excepted to said issues and each of them.

Exception No. 8.

The defendant in apt time requested the court to charge the jury as follows:

"1. It is undisputed that the shipment of the casket which it is alleged was delayed, was a shipment in interstate commerce; that is, a shipment from the State of North Carolina to the State of South Carolina. The plaintiff offered a bill of lading herein, containing a provision that the company should not be liable in any event for more than fifty dollars on said shipment. It is admitted that the defendant paid to the plaintiff the full value of the shipment alleged to have been delayed and that plaintiff's claims for damages for the value of the shipment have been settled. The court therefore charges the jury that under the law governing this case the plaintiff is not entitled to recover any other or further damage, and directs the jury to render a verdict accordingly."

The court refused to give this instruction to the jury, and the defendant excepted.

Exception No. 9.

The defendant in apt time requested the court to charge the jury as follows:

36½ "2. As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damage claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover any such damage; the jury is therefore directed to render a verdict for the defendant."

The court refused to give this instruction to the jury, and the defendant excepted.

#### Exception No. 10.

The defendant in apt time requested the court to charge the jury as follows:

"3. In no view of the evidence in this case is the plaintiff entitled to recover damage for mental suffering or mental anguish on account of the delay of the shipment mentioned in the complaint, and as this action was brought for such mental suffering and mental anguish only, the jury is instructed to render a verdict for the defendant."

The court refused to give this instruction to the jury, and the defendant excepted.

#### Exception No. 11.

The defendant in apt time requested the court to charge the jury as follows:

"4. The defendant pleads and relies upon the Acts of Congress passed, regulating interstate commerce in this case and asks the court to instruct the jury that under the Acts of Congress regulating interstate commerce and particularly under the Hepburn Act, passed June 29, 1906, by the Congress of the United States, with its amendments, there is no liability on the defendant for the cause  
37 of action sued for in this case, and the jury are therefore instructed to render a verdict for the defendant."

The court refused to give this instruction to the jury and the defendant excepted.

#### Exception No. 12.

The defendant in apt time requested the court to charge the jury as follows:

"5. That attention of the court is expressly called by the defendant to the Acts of Congress of the United States, regulating interstate commerce and said Acts are expressly relied on by the defendant as exempting it from any and all liability in this cause and the court is respectfully requested to instruct the jury that in no view of the evidence in this case is the plaintiff entitled to recover damages for the cause of action alleged in this complaint."

The court refused to give this instruction to the jury and the defendant excepted.

#### Exception No. 13.

The defendant in apt time requested the court to charge the jury as follows:

"6. That the decisions of the United States Court do not recognize the doctrine of mental anguish and that under the law governing this case the plaintiff is not entitled to recover any sum of money whatsoever for mental anguish or mental suffering, and the jury in rendering their verdict will not take into consideration any such alleged cause of action."

The court refused to give this instruction to the jury, and the defendant excepted.

38

## Exception No. 14.

The defendant in apt time requested the court to charge the jury as follows:

"7. The bill of lading introduced by the plaintiff and issued by the defendant for the shipment mentioned in the complaint in this cause, contains this provision: 'The Company shall not be liable for loss, damage or detention of said property unless a claim therefor shall be presented in writing to its agent at destination office, verified by affidavit accompanied by this contract, within ninety days from the date of the loss, damage, or detention of said shipment,' and the court charges the jury that there is no evidence that any such claim was presented in writing to the defendant or its agent and for that reason the plaintiff is not entitled to maintain this action, and the jury is directed to render a verdict for the defendant."

The court refused to give this instruction to the jury, and the defendant excepted.

The court charged the jury as follows:

GENTLEMEN OF THE JURY: This is an action in which the plaintiff, John Byers, seeks to recover for damages alleged to have been sustained by him, in the nature of mental anguish which he suffered, as he contends, as the proximate consequence of the negligent failure of the defendant, Southern Express Company, to expeditiously transport the casket and other property which he had purchased for the purpose of burying his wife at Hickory Grove.

The first issue: "Did the defendant, Southern Express Company, receive from the plaintiff the casket and other property for transportation from Asheville, N. C., to Hickory Grove, S. C., with the knowledge that said casket and other property were to be used 38 1/4 in burying the plaintiff's wife, and with notice of the necessity for an expeditious delivery thereof?"

The court charges you that if you believe the evidence in this case, you should answer the first issue "yes," that the Express Company received it with notice as to what it was to be used for, and with notice that it was to be expeditiously delivered.

The second issue is: "Did the defendant negligently fail to expeditiously transport said casket and other property to Hickory Grove, S. C.?"

Your answer to this issue will depend upon what you find from the evidence in this case to be the facts. The plaintiff contends that you should answer the issue "yes," thereby finding that the defendant did negligently fail to expeditiously transport the said

casket and other property to Hickory Grove. The defendant contends that if you answer "yes" to the first issue, that upon this evidence you should not be satisfied by its greater weight, that it was guilty of negligently failing to transport this casket and other property expeditiously, therefore the defendant asks that you answer the second issue "no."

The court charges you that the burden is upon the plaintiff to satisfy you by the greater weight of the evidence, that the defendant negligently failed to expeditiously transport said casket and other property to Hickory Grove, South Carolina, in order to justify you in answering that second issue "yes." The defendant contends that the evidence does not justify you in answering the second issue "yes" and that you should answer it "no."

The plaintiff contends, gentlemen of the jury, under that issue, that when the casket was delivered, that the agent of the Southern Express Company was notified that it was for the purpose of providing for the burial of this plaintiff's wife, and that further notice was given to the agent of the company, which would be notice to the company, that the funeral was fixed for the following morning.

The defendant, on the other hand, contends that the notice which was given to it was that the funeral would be the next day, and that nothing was said about it being in the morning of the next day.

The plaintiff contends that with this notice given, that the defendant failed to do what it should have done in the exercise of its duty to the plaintiff in expeditiously transporting the casket and this other property to Hickory Grove.

The defendant, on the other hand, contends that with the notice it had, it did what was its full duty in making the shipment on the 4:10 train that afternoon, which was the train, as the defendant contends, that the plaintiff's agent designated as the train that the shipment should be made on.

The court charges you that with notice to this defendant, at the time of its accepting this casket and other property, that it was to be used at the funeral for the burial of the plaintiff's wife in Hickory Grove, then the duty was imposed upon the defendant to select that method of transportation, or route which within the usual and ordinary course of events reasonably assured the delivery, at the point of designation, Hickory Grove, within the time in contemplation of the parties, at the time the casket was delivered. By that I mean this, gentlemen of the jury, that if at the time this casket was delivered you find the facts to be that the defendant was notified that the funeral would be the next morning, and it, upon that notice, could have delivered the casket and other property at Hickory Grove by the next morning, by sending it out on this train leaving here at 2:25, designated as Number 12, or by some other train which was available to it, in the conduct of its business, and failed to do so, but selected the 4:10 train, with knowledge of the fact that it would not reach Hickory Grove until the afternoon of the next day, I say, if the defendant, with knowledge of the fact that the funeral was to be in the morning, accepted it and under those cir-

cumstances, shipped it on a train leaving here at 4:10, with knowledge that with the ordinary connections, that it would not reach Hickory Grove until the afternoon of the following day, then that would be negligence on the part of the defendant and make it your duty to answer the second issue "yes."

But if on the other hand the notice given, and you find the fact from the evidence, was that the funeral was to be the next day, without designating that it would be in the morning of the next day, and that the defendant shipped it on this 4:10 train, by which, in the usual, regular and customary course of events, under the usual schedules and connections, the casket would have reached there during the next day, even though in the afternoon, the defendant not having notice that the funeral was in the morning, then you should answer this second issue "no" instead of "yes."

In other words, in order to hold the defendant negligent in failing to have the casket and other property there on the following morning, it is necessary that the plaintiff should have satisfied you, by the greater weight of the evidence, that he notified the defendant that the funeral was to be in the morning, as contended by the plaintiff.

The plaintiff contends that he gave that notice to the defendant, and that the defendant could and should have shipped it by that 2:25 train, or some other train that would have placed that casket in Hickory Grove on the following morning, this is the contention of the plaintiff, when the casket and other property was shipped.

The defendant contends that it had no such notice and that it shipped on the 4:10 train and that it would reach Hickory Grove on the next day, and from the notice which it received the funeral would take place on the next day. The defendant contends that it could not have selected any other train, other than the 4:10 train, which carried express, which would have put this casket in Hickory Grove earlier than the train on which it was shipped.

If you answer this second issue "no," you need not answer the third issue. If you answer the second issue "yes," then it would be your duty to go to the third issue. "What damages, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant?"

The burden is upon the plaintiff on this issue, to satisfy you by the greater weight of the evidence that he sustained mental anguish, and by "mental anguish" I do not mean simply that he was annoyed, or disturbed or worried because the casket and other property did not arrive, or because the funeral had to be postponed, or other derangement of his plans.

Mental anguish is defined by our courts as a high degree of mental suffering, and that mental suffering must be the direct and proximate consequence of the negligence of the defendant, in order for the plaintiff to be entitled to recover any damages from the defendant.

The court charges you that if you come to the consideration of this third issue, that is, if you have answered the second issue "yes," that the defendant was negligent, if you come to the consideration of the

41 third issue as to damages, it becomes your duty to carefully distinguish between any suffering, any mental suffering, or mental anguish of the plaintiff which was the result of the death of his wife and her loss to him, and the mental anguish which he suffered as the direct consequence or proximate result of the failure of the casket and other property to arrive in time for this funeral.

In other words, it is the mental suffering that he endured, in addition to any suffering and outside of any suffering or distress which was sustained by him on account of the loss of his wife and his grief on that account.

I charge you further on this third issue, if you come to its consideration, that it is not proper for you to allow any damages against this defendant in the nature of punishment of the defendant, even though you have found the defendant to be negligent in the respect alleged in the complaint, yet in this action it would not be proper for you to award any damages by way of punishment of the defendant.

The only damages that are allowable, if you come to the consideration of this third issue, would be such as in your judgment would fairly and justly compensate this plaintiff for the mental anguish which he suffered as the natural, direct and proximate consequence of the negligence of the defendant.

You are not to be swerved in your consideration of these issues by any prejudice against or any favor toward the plaintiff on account of his color or condition, you will not permit any prejudice that you may have, I will not assume that you have any prejudice, but you will not permit the fact that this defendant is a public service corporation to affect in the slightest your verdict. You will simply pass upon these issues, under the evidence and the law as laid down to you by the court. If you answer the second issue yes, your answer to the third issue would be the amount. If you answer the second  
42 issue "no," you need not consider the third issue; if you answer the third issue "yes," finding that the defendant suffered mental anguish, you will then proceed to allow as damages such amount as you may find would reasonably and justly compensate him for such mental anguish, as you may find under the evidence and the charge of the court as I have delivered it to you.

The jury rendered the verdict in favor of the plaintiff as appears in the record.

#### Exception No. 15.

The defendant moved the court to set aside the verdict and for a new trial. Motion overruled, and defendant excepted.

#### Exception No. 16.

Judgment was rendered in favor of the plaintiff as appears in the record, and the defendant excepted and appealed to the Supreme Court.

#### Exception No. 17.

The defendant excepted to that portion of his Honor's charge which reads as follows:



"The court charges you that if you believe the evidence in this case, you should answer the first issue 'yes,' that the Express Company received it with notice as to what it was to be used for, and with notice that it was to be expeditiously delivered."

Exception No. 18.

The defendant excepted to that portion of his Honor's charge which reads as follows:

43 "The plaintiff contends, gentlemen of the jury, under that issue, that when the casket was delivered, that the agent of the Southern Express Company was notified that it was for the purpose of providing for the burial of this plaintiff's wife, and that further notice was given to the agent of the company, which would be notice to the company that the funeral was fixed for the following morning."

Exception No. 19.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The court charges you that with notice to this defendant, at the time of its accepting this casket and other property, that it was to be used at the funeral for the burial of the plaintiff's wife in Hickory Grove, then the duty was imposed upon the defendant to select that method of transportation, or route which within the usual and ordinary course of events reasonably assured the delivery, at the point of designation, Hickory Grove, within the time in contemplation of the parties, at the time the casket was delivered. By that I mean this, gentlemen of the jury, that if at the time this casket was delivered you find the facts to be that the defendant was notified that the funeral would be the next morning, and it upon that notice, could have delivered the casket and other property at Hickory Grove by the next morning, by sending it out on this train leaving here at 2:25, designated as Number 12, or by some other train which was available to it, in the conduct of its business, and failed to do so, but selected the 4:10 train, with knowledge of the fact that it would not reach Hickory Grove until the afternoon of the next day, I say, if the defendant, with knowledge of the fact that the funeral was to be in the morning, accepted it and under those circumstances shipped it on a train leaving here at 4:10 with knowledge  
44 that with the ordinary connections, that it would not reach Hickory Grove until the afternoon of the following day, then that would be negligence on the part of the defendant and make it your duty to answer the second issue, 'yes.'"

Exception No. 20.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"In other words, in order to hold the defendant negligent in failing to have the casket and other property there on the following morning, it is necessary that the plaintiff should have satisfied you,



by the greater weight of the evidence, that he notified the defendant that the funeral was to be in the morning, as contended by the plaintiff."

#### Exception No. 21.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"If you answer this second issue 'no,' you need not answer this third issue. If you answer the second issue 'yes,' then it would be your duty to go to the third issue, 'What damages, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant?'"

#### Exception No. 22.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The burden is upon the plaintiff on this issue, to satisfy you by the greater weight of the evidence that he sustained mental  
45 anguish, and by 'mental anguish' I do not mean simply that he was annoyed, or disturbed or worried because the casket and other property did not arrive, or because the funeral had to be postponed, or other derangement of his plans.

#### Exception No. 23.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The court charges you that if you come to the consideration of this third issue, that is, if you have answered the second issue 'yes,' that the defendant was negligent, if you come to the consideration of the third issue as to damages, it becomes your duty to carefully distinguish between any suffering, any mental suffering, or mental anguish of the plaintiff which was the result of the death of his wife and her loss to him, and the mental anguish which he suffered as the direct consequence or proximate result of the failure of the casket and other property to arrive in time for this funeral."

#### Exception No. 24.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"In other words, it is the mental suffering that he endured, in addition to any suffering and outside of any suffering or distress which was sustained by him on account of the loss of his wife and his grief on that account."

#### Exception No. 25.

The defendant excepted to that portion of his Honor's charge which reads as follows:

46 "I charge you further on this third issue, if you come to its consideration, that it is not proper for you to allow any

damages against this defendant in the nature of punishment of the defendant to be negligent in the respect alleged in the complaint, yet in this action it would not be proper for you to award any damages by way of punishment of the defendant."

Exception No. 26.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The only damages that are allowable, if you come to the consideration of this third issue, would be such as in your judgment would fairly and justly compensate this plaintiff for the mental anguish which he suffered as the natural, direct and proximate consequence of the negligence of the defendant."

Exception No. 27.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"If you answer the third issue 'yes,' finding that the plaintiff suffered mental anguish, you will then proceed to allow as damages such amount as you may find would reasonably and justly compensate him for such mental anguish, as you may find under the evidence and the charge of the court as I have delivered it to you."

The foregoing case on appeal is agreed to.

MARTIN, ROLLINS & WRIGHT,

*Attorneys for Defendant.*

MARK W. BROWN,

*Attorney for Plaintiff.*

*Summary of Exceptions.*

The defendant excepted as follows:

Exception No. 1.

During the course of the trial the plaintiff was asked: "How were you affected when you got down there and found that the casket was not down there?"

The defendant objected to this question upon the ground that the plaintiff was bound by the terms of the receipt which the law required the Express Company to give for the shipment. The objection was overruled and the defendant excepted. The witness then answered:

"I was hardly able to attend to anything on account of my wife and I had to do the best I could because I was kinder broke down when I got down there and could not do anything."

"Q. Did you suffer in mind and body? A. Yes, I suffered in mind and body a great deal."

## Exception No. 2.

The plaintiff was asked this question:

"Please state how you were affected because of the failure of this casket, hose and other things that you were to use to bury your wife, to arrive in time for burial?"

To this question the defendant objected. The objection was overruled and the defendant excepted. The witness answered:

"I was affected on account of that and there was a great deal of talk down there about it and they interrupted me powerful about it and I was hurt over my wife and about the casket not being  
48 there and I had a great many to be there and it bothered me terribly; I hardly knowed what to do."

"Q. You said that you were interrupted terribly about it. What do you mean by that? A. I was bothered about it not being there. I expected it to be there when I got there. That is what I meant."

## Exception No. 3.

The plaintiff was further asked:

"What did you mean when you told Mr. Martin that the only mental suffering you had was on account of your wife's death?"

The defendant objected to this question. Objection was overruled and the defendant excepted.

The witness then answered:

"I did not have anything to suffer about only her. I was almost sick myself after I heard of her death so sudden, it hurt me so bad. I did not have anything else to suffer about. That was all I meant."

"Q. Did you suffer any on account of the casket? A. Yes."

## Exception No. 4.

At the conclusion of the plaintiff's testimony the defendant moved the court to dismiss the action and for judgment as of non-suit. Motion overruled and the defendant excepted.

## Exception No. 5.

In the course of the trial the defendant offered in evidence its schedule of rates filed with the interstate Commerce Commission, as provided by the Act of Congress, showing rates between  
49 points in North Carolina and points in South Carolina, and proved that the schedule of rates was in effect at and before this shipment mentioned in this case. To the admission of this schedule of rates the plaintiff objected. The objection was sustained and the defendant excepted.

## Exception No. 6.

At the conclusion of the testimony the defendant renewed its motion for judgment as of non-suit under the Hinsdale Act. Motion overruled and the defendant excepted.

## Exception No. 7.

The court thereupon settled the issues as appear in the record and submitted the same to the jury, and the defendant excepted to said issues and each of them.

## Exception No. 8.

The defendant in apt time requested the court to charge the jury as follows:

"1. It is undisputed that the shipment of the casket which it is alleged was delayed, was a shipment in interstate commerce; that is, a shipment from the State of North Carolina to the State of South Carolina. The plaintiff offered a bill of lading herein, containing a provision that the company should not be liable in any event for more than fifty dollars on said shipment. It is admitted that the defendant paid to the plaintiff the full value of the shipment alleged to have been delayed and that plaintiff's claims for damages for the value of the shipment have been settled. The court therefore charges the jury that under the law governing this case the plaintiff is not entitled to recover any other or further damage, and directs the jury to render a verdict accordingly."

The court refused to give this instruction to the jury, and the defendant excepted.

## Exception No. 9.

The defendant in apt time requested the court to charge the jury as follows:

"2. As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damage claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover any such damage; the jury is therefore directed to render a verdict for the defendant."

The court refused to give this instruction to the jury, and the defendant excepted.

## Exception No. 10.

The defendant in apt time requested the court to charge the jury as follows:

"3. In no view of the evidence in this case is the plaintiff entitled to recover damage for mental suffering or mental anguish on account of the delay of the shipment mentioned in the complaint, and as this action was brought for such mental suffering and mental anguish only, the jury is instructed to render a verdict for the defendant."

The court refused to give this instruction to the jury, and the defendant excepted.

## Exception No. 11.

The defendant in apt time requested the court to charge the jury as follows:

51 "4. The defendant pleads and relies upon the Acts of Congress passed, regulating interstate commerce in this case and asks the court to instruct the jury that under the Acts of Congress regulating interstate commerce and particularly under the Hepburn Act, passed June 29, 1906, by the Congress of the United States, with its amendments, there is no liability on the defendant for the cause of action sued for in this case, and the jury are therefore instructed to render a verdict for the defendant."

The court refused to give this instruction to the jury and the defendant excepted.

## Exception No. 12.

The defendant in apt time requested the court to charge the jury as follows:

"5. The attention of the court is expressly called by the defendant to the Acts of Congress of the United States, regulating interstate commerce and said Acts are expressly relied on by the defendant as exempting it from any and all liability in this cause and the court is respectfully requested to instruct the jury that in no view of the evidence in this case is the plaintiff entitled to recover damages for the cause of action alleged in this complaint."

The court refused to give this instruction to the jury, and the defendant excepted.

## Exception No. 13.

The defendant in apt time requested the court to charge the jury as follows:

52 "6. That the decisions of the United States Court do not recognize the doctrine of mental anguish and that under the law governing this case the plaintiff is not entitled to recover any sum of money whatsoever for mental anguish or mental suffering, and the jury in rendering their verdict will not take into consideration any such alleged cause of action."

The court refused to give this instruction to the jury, and the defendant excepted.

## Exception No. 14.

The defendant in apt time requested the court to charge the jury as follows:

"7. The bill of lading introduced by the plaintiff and issued by the defendant for the shipment mentioned in the complaint in this cause, contains this provision: 'The Company shall not be liable for loss, damage or detention of said property unless a claim therefor shall be presented in writing to its agent at destination office, verified by affidavit accompanied by this contract, within ninety days from

the date of the loss, damage or detention of said shipment,' and the court charges the jury that there is no evidence that any such claim was presented in writing to the defendant or its agent and for that reason the plaintiff is not entitled to maintain this action, and the jury is directed to render a verdict for the defendant."

The court refused to give this instruction to the jury, and the defendant excepted.

The jury rendered the verdict in favor of the plaintiff as appears in the record.

Exception No. 15.

The defendant moved the court to set aside the verdict and for a new trial. Motion overruled, and defendant excepted.

Exception No. 16.

53 Judgment was rendered in favor of the plaintiff as appears in the record, and the defendant excepted and appealed to the Supreme Court.

Exception No. 17.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The court charges you that if you believe the evidence in this case, you should answer the first issue 'yes,' that the Express Company received it with notice as to what it was to be used for, and with notice that it was to be expeditiously delivered."

Exception No. 18.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The plaintiff contends, gentlemen of the jury, under that issue, that when the casket was delivered, that the agent of the Southern Express Company was notified that it was for the purpose of providing for the burial of this plaintiff's wife, and that further notice was given to the agent of the company, which would be notice to the company that the funeral was fixed for the following morning."

Exception No. 19.

The defendant excepted to that portion of his Honor's charge which reads as follows:

54 "The court charges you that with notice to this defendant, at the time of its accepting this casket and other property, that it was to be used at the funeral for the burial of the plaintiff's wife in Hickory Grove, then the duty was imposed upon the defendant to select that method of transportation, or route which within the usual and ordinary course of events reasonably assured the delivery, at the point of designation, Hickory Grove, within the time in contemplation of the parties, at the time the casket was delivered. By that I mean this, gentlemen of the jury, that if at the time this

casket was delivered you find the facts to be that the defendant was notified that the funeral would be the next morning, and it upon that notice, could have delivered the casket and other property at Hickory Grove by the next morning, by sending it out on this train leaving here at 2:25, designated as Number 12, or by some other train which was available to it, in the conduct of its business, and failed to do so, but selected the 4:10 train, with knowledge of the fact that it would not reach Hickory Grove until the afternoon of the next day, I say, if the defendant, with knowledge of the fact that the funeral was to be in the morning, accepted it and under those circumstances, shipped it on a train leaving here at 4:10 with knowledge that with the ordinary connections, that it would not reach Hickory Grove until the afternoon of the following day, then that would be negligence on the part of the defendant, and make it your duty to answer the second issue, 'yes.' "

Exception No. 20.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"In other words, in order to hold the defendant negligent in failing to have the casket and other property there on the following morning, it is necessary that the plaintiff should have satisfied you, by the greater weight of the evidence, that he notified the defendant that the funeral was to be in the morning, as contended by the plaintiff."

55  
Exception No. 21.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"If you answer this second issue 'no,' you need not answer this third issue. If you answer the second issue 'yes,' then it would be your duty to go to the third issue, 'What damages, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant?'"

Exception No. 22.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The burden is upon the plaintiff on this issue, to satisfy you by the greater weight of the evidence that he sustained mental anguish, and by 'mental anguish' I do not mean simply that he was annoyed, or disturbed or worried because the casket and other property did not arrive, or because the funeral had to be postponed, or other derangement of his plans."

Exception No. 23.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The court charges you that if you come to the consideration of this third issue, that is, if you have answered the second issue 'yes,'

that the defendant was negligent, if you come to the consideration of the third issue as to damages, it becomes your duty to carefully distinguish between any suffering, mental suffering, or mental anguish of the plaintiff which was the result of the death of his wife and her loss to him, and the mental anguish which he suffered as the direct consequence or proximate result of the failure of the casket and other property to arrive in time for the funeral."

56

## Exception No. 24.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"In other words, it is the mental suffering that he endured, in addition to any suffering and outside of any suffering or distress which was sustained by him on account of the loss of his wife and his grief on that account."

## Exception No. 25.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"I charge you further on this third issue, if you come to its consideration, that it is not proper for you to allow any damages against this defendant in the nature of punishment of the defendant to be negligent in the respect alleged in the complaint, yet in this action it would not be proper for you to award any damages by way of punishment of the defendant."

## Exception No. 26.

The defendant excepted to that portion of his Honor's charge which reads as follows:

"The only damages that are allowable, if you come to the consideration of this third issue, would be such as in your judgment would fairly and justly compensate this plaintiff for the mental anguish which he suffered as the natural, direct and proximate consequence of the negligence of the defendant."

## Exception No. 27.

The defendant excepted to that portion of his Honor's charge which reads as follows:

57 "If you answer the third issue 'yes,' finding that the defendant suffered mental anguish, you will then proceed to allow as damages such amount as you may find would reasonably and justly compensate him for such mental anguish, as you may find under the evidence and the charge of the court, as I have delivered it to you."

Sept. 27th, 1913.

MARTIN, ROLLINS & WRIGHT,  
*Attorneys for Defendant.*



*Clerk's Certificate.*

NORTH CAROLINA,  
Buncombe County:

(Title of Cause.)

I, Marcus Erwin, Clerk of the Superior Court of Buncombe County, North Carolina, do hereby certify that the foregoing record in case on appeal is a true and perfect transcript of the record in the case of John Byers v. Southern Express Company, as the same appears of record in my office. This the 12 day of November, 1913.

MARCUS ERWIN,  
Clerk Superior Court of Buncombe  
County, North Carolina.

58

*Docket Entries.*

Appeal docketed November 13, 1913.

Argued December 2, 1913; Held under advisari.

Opinion by Clark, C. J., Concurring opinion by Hoke, J., and dissenting opinion by Brown, J., filed May 13, 1914, as follows:

59 North Carolina Supreme Court, Spring Term, 1914.

#593. Buncombe.

JOHN BYERS  
v.  
SOUTHERN EXPRESS CO.

Mark W. Brown for Plaintiff.

Martin, Rollins & Wright for Defendant.

CLARK, C. J.:

The plaintiff's wife died at Hickory Grove, S. C., while on a visit to her mother and plaintiff who lived in Asheville purchased there a casket, robe, gloves, hose, and other articles suitable for her burial and shipped them by the defendant to Hickory Grove, notifying the express agent that these articles were to be used in the burial of his wife, the following morning. The agent promised to ship the casket and other articles on the first train and guaranteed that they would be delivered that night or early the next morning in full time for the funeral.

The distance via Spartanburg and Blacksburg to Hickory Grove was 112 miles and if the casket had left Asheville by the first train at 4.10 p. m. it would have reached its destination the same night. The casket had been delivered to the defendant early that morning. If it had been held by defendant at Spartanburg all night and then

been shipped to Blacksburg at 7.30 the following morning on train 36 which carried the express, it would have reached Blacksburg at 8.33 a. m. and would have left there at 9.05 a. m. reaching Hickory Grove at 9.37 a. m. in ample time for the funeral at 11 a. m.

The distance via Marion was 124 miles and if the casket had been shipped on the first train over that route, it would have left Asheville at 2.25 p. m. reaching Hickory Grove at 8.06 p. m. the same day.

Instead of shipping the casket by either of these two routes it was sent via Columbia, S. C., a distance of 300 miles and could not have reached Hickory Grove till 5.25 p. m. the following day. As a matter of fact, the casket did not reach Hickory Grove until Wednesday, the second day after it left Asheville. The funeral was on Tuesday. The purchase and delivery to the defendant was early Monday morning.

The plaintiff left Asheville Monday night via Spartanburg and when he reached Hickory Grove Tuesday morning he found that the casket had not arrived. The funeral which had been fixed for 11 o'clock was then changed to 4 p. m. The casket still did not come and finding that the body could not be held longer, by the aid of a friend he procured a cheap casket, but without proper burial clothing for his wife, and the burial took place.

The above is condensed from the uncontradicted testimony.

60 The defendant admits the negligence, endorsing on its voucher that the "casket was misrouted from Asheville, N. C., by transfer clerk Deweese." The defendant put in evidence the following receipt "Received at Asheville on 25 May 1912 \$64.17, said amount being in full payment for one coffin delivered to the Southern Express Co. at Asheville, N. C., on 1 April 1912 by John Byers to be shipped to Sarah Moore, Hickory Grove, S. C." On this was a memorandum that the casket had been misrouted and was refused on that account on arriving at destination too late for the funeral, and that the defendant had returned it to Asheville and sold it for \$15 to the company from whom Byers had bought it. The defendant claims that the acceptance of payment for the value of the casket should be construed as a waiver by plaintiff of his right to other damages. The receipt does not say so, but recites that it is "in full payment for one coffin." The uncontradicted evidence of the plaintiff is that the defendant "paid him for all the money he paid out on the casket and other things, but did not pay him anything for the damages." It was competent thus to explain the receipt, if necessary. Counsel for the defendant also admitted that it was fully understood by plaintiff's attorney and the agent of the defendant at the time the receipt was signed that it did not cover any claim for the damages. The record shows as follows: The Court said, speaking to defendant's counsel, "You gentlemen do not claim that you settled anything that is covered by this complaint?" To which Mr. Martin replied: "No, your Honor, we do not claim that we paid anything for mental suffering."

There was evidence of mental suffering, but it would have been inferred as a matter of law upon the circumstances of this case. Under the law of this State, where the contract of shipment was made,

the plaintiff is entitled to recover such damages. *Thompson v. Express Co.* 144 N. C. 389; *Penn. v. Tel. Co.* 159 N. C. 306. Upon all the authorities damages for mental anguish are compensatory damages. *Carmichael v. Telephone Co.* 157 N. C. 25 where the authorities are summed up by Hoke J. citing among other cases, *Osborn v. Leach* 135 N. C. 628 and *Head v. R. R.* 79 Ga. 358, quoting *Bleckley C. J.* in the latter case, who says: "Wounding a man's feelings is as much actual damages as breaking his limb. The difference is that one is internal and the other external; one mental, the other physical. At common law, compensatory damages include upon

61 principle and upon authority *salve for wounded feelings*, and our Code had no purpose to deny such damages where the common law allowed them." It makes no difference, as this Court has always held, whether the action or claim to recover damages for mental suffering is based upon breach of contract or upon tort. *Penn. v. Tel. Co.* 159 N. C. 309 and numerous cases there quoted. In *Thompson v. Express Co.* 144 N. C. 392 it was held in the opinion by Hoke J. that the claim of damages for mental anguish "is not a separate cause of action at all, but only a further element of damages." It follows, therefore, that settlement as to the coffin, which was paid for by the defendant and resold to the original owner, was in nowise a settlement of "the further element of damages." Besides, as counsel frankly admitted, there has been in fact no settlement as to damages for mental anguish. The plaintiff has received no compensation for such damages, which, he is now suing for.

The only other point raised is that this being an interstate shipment under the "Hepburn Act" the defendant was authorised to limit its liability. But a reference to that statute shows that such authorisation extends only to liability for damages "to such property." The compensatory damages sought by reason of the mental anguish sustained by the plaintiff from the misconduct of the defendant is special damages and was not in the contemplation of, nor within the language used in that act.

The defendant contends that it is protected by the following stipulation in the bill of lading: "Agreed that the defendant's liability in no event shall exceed the sum of \$50. on account of loss or damage to said shipment, or delay in delivering the same." The expression "delay in delivering the same" is not within the words of the Act of Congress upon which the defendant relies. The Carmack Amendment to the Interstate Commerce Act is construed in *Adams Express Co. v. Croninger* 226 U. S. 491; *R. R. v. Elevator Co.* Ib. 427; *R. R. v. Carl* 227 U. S. 639; *R. R. v. Harriman* Ib. 657, and none of them construe the act to embrace damages accruing from delay, and still less do any of those decisions intimate that the act covers special damages, such as mental anguish, which are not damages to the property. The Carmack Amendment is set out in 226 U. S. 503, and provides that the carrier shall be liable to the lawful holder of any bill of lading "for any loss, damage or injury to such property caused by it, or by any common carrier etc. to which such property may be delivered or over whose lines such property may pass and no contract, receipt, rule or regulation, shall exempt such common carrier, railroad, or transportation company from

surety do pay the costs of the appeal in this Court incurred, to wit the sum of Thirteen 15/100 dollars (\$13.15), and execution issue therefor.

## Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the transcript of record on file in this Court in the case lately pending therein and entitled John Byers vs. Southern Express Company, as appears from the original on file in my office.

Witness my hand and the seal of said Court at office in Raleigh, this 6th day of July, 1914.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,

*Clerk Supreme Court.*

Endorsed on cover: File No. 24,307. North Carolina Supreme Court. Term No. 201. Southern Express Company, plaintiff in error, vs. John Byers. Filed July 9, 1914. File No. 24,307.

7  
Office Supreme Court, U. S.

FILED

JAN 18 1916

JAMES D. MAHER  
CLERK

**In the Supreme Court of the United States,**

NOVEMBER TERM, 1915.

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**No. 201.**

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**SOUTHERN EXPRESS COMPANY,**  
*Plaintiff in Error,*

**vs.**

**JOHN BYERS.**

---

**BRIEF OF PLAINTIFF IN ERROR.**

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in the Supreme Court of the United States,  
and the Supreme Court of the State of New York.

**In the Supreme Court of the United States,**  
NOVEMBER TERM, 1915.

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**No. 201.**

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SOUTHERN EXPRESS COMPANY, PLAINTIFF IN  
ERROR,

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BRIEF OF PLAINTIFF IN ERROR.

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IN THE SUPREME COURT OF THE UNITED STATES.

NOVEMBER TERM, 1915.

SOUTHERN EXPRESS COMPANY, PLAINTIFF IN ERROR,

*vs.*

JOHN BYERS.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is a writ of error sued out on behalf of the Southern Express Company, hereinafter called the Company, plaintiff in error, against the defendant, John Byers, to review a decision of the Supreme Court of North Carolina, rendered at February Term, 1914.

The action was brought by Byers, in the Superior Court of Buncombe County, at Asheville, North Carolina, to recover damages alleged to have been sustained on account of mental anguish and suffering of the said Byers for the failure of the Company to deliver a coffin in time for the funeral of Byers' wife. The coffin was shipped from Asheville, by express, over the Company's lines to Hickory Grove, South Carolina. In addition to the coffin the shipment included robe, gloves, hose and other articles alleged to be necessary for the proper disposing of the body of the wife of Byers. The shipment was made on April 1, 1912, and should have been delivered on April 2, 1912, and the jury found that the Company was guilty of negligence in failing to expeditiously transport said property (Record, p. 16), and assessed the plaintiff's damages on account of mental anguish at the sum of two hundred and fifty (\$250.00) dollars (Record, p. 16). A judgment was rendered in the trial court in favor of Byers and against the Company, and the Company appealed to the Supreme Court of North Carolina, where said judgment was affirmed. *Byers v. Express Co.*, 163 N. C., 542.

It appeared on the trial, and is set out in the case on appeal (Record, p. 17), that the coffin was delivered to the Company at Asheville on the 1st day of April, 1912, and the Company gave a regular express receipt therefor dated on said day, which is set out in full on pages 18 to 20 of the Record. The funeral had been fixed for eleven o'clock on the morning of the 2nd (Record, p. 21), but as the coffin did not arrive in time the funeral was postponed until four or five o'clock that afternoon. The coffin did not arrive on the train passing Hickory Grove about two o'clock on the day mentioned, and Byers procured another and interred his wife the same day. On the following day the coffin arrived at Hickory Grove, but as Byers had no use for it, he declined to receive it and made claim against the Company for the value of the coffin and its contents, and the Company paid him sixty-four and 17-100 (\$64.17) dollars and took his receipt therefor. After this payment was made for the loss of Byers on the property shipped, this action was brought to recover damages for mental anguish. It was admitted on the trial (Record, p. 23), that the receipt referred to did not cover any damages for alleged mental suffering. The cause of action set up in the complaint was one exclusively for mental anguish for alleged failure to deliver the shipment in time for the funeral. The receipt given by the Company for the shipment provided (Record, p. 18), as follows: "the shipper agrees that the Company shall not be liable in any event for more than fifty (\$50) dollars on any shipment of one hundred (100) pounds or less."

### ASSIGNMENTS OF ERROR.

The plaintiff in error assigns error (Record, pp. 2 to 7) as follows:

#### I.

For that said Supreme Court of North Carolina held that the receipt given by the plaintiff in error to the defendant in error for the shipment mentioned in the complaint in this cause, in which plaintiff's damages and right of recovery were limited to fifty dollars, was not binding

upon the said defendant in error and overruled the objection of the plaintiff in error to the testimony of the defendant in error, as follows:

"I was hardly able to attend to anything on account of the loss of my wife, and I had to do the best I could because I was broke down when I got down there and could not do anything."

"Q. Did you suffer in body and mind? A. Yes, I suffered in mind and body a great deal."

The plaintiff in error insists that this testimony was incompetent and that damages for mental suffering cannot be recovered for delay of an interstate shipment, under the laws applicable thereto.

## II.

For that the Supreme Court of North Carolina erred in overruling the Second Exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"A. I was affected on account of that and there was a great deal of talk down there about it and they interrupted me powerful about it, and I was hurt over my wife and about the casket not being there and I had a great many to be there and it bothered me terribly. I hardly knowed what to do.

"Q. You said that you were interrupted terribly about it, what do you mean by that? A. I was bothered about it not being there. I expected it to be there when I got there; that was what I meant.

"Q. What did you mean when you told Mr. Martin that the only mental suffering you had was on account of your wife's death?"

This testimony was objected to upon the same ground as that mentioned in the First Assignment of Error, and plaintiff in error insists that the same was incompetent because its purpose and effect was to add to the defendant's liability as construed by the Supreme Court of North Carolina and additional liability beyond that contemplated by the receipt or bill of lading given by the

plaintiff in error to the defendant in error at the date of said shipment.

### III.

For that the said Supreme Court of North Carolina erred in overruling the objection and exception of the plaintiff in error, number five, and in holding that the schedule of rates filed by the plaintiff in error with Interstate Commerce Commission as provided by the Acts of Congress, showing rates of shipment between points in North Carolina and points in South Carolina, was incompetent. The purpose of this evidence was to show that the plaintiff in error had complied with United States Statutes in regard to interstate commerce and was entitled to the benefit of said statutes.

### IV.

For that the Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to the action of the Court below in refusing the entering of a judgment as of non-suit in the cause, as set out in the Sixth Exception of the Defendant in Error.

### V.

For that the said Supreme Court of North Carolina erred in overruling the Seventh Exception of the Plaintiff in Error to the submission of the issues set out in the record in this cause, and especially to the submission of the issues as to damages on account of mental anguish, set out in the record.

### VI.

For that the said Supreme Court of North Carolina erred in overruling the Eighth Exception of the plaintiff in error, and in holding that the trial court committed no error in refusing to give plaintiff in error's first request to charge the jury as follows:

"1. It is undisputed that the shipment of the casket which it is alleged was delayed, was a shipment in interstate commerce; that is, a shipment from the State of North Carolina to the State of South Carolina. The plaintiff offered a bill of lading herein, containing a pro-

vision that the company should not be liable in any event for more than fifty dollars on said shipment. It is admitted that the defendant paid to the plaintiff the full value of the shipment alleged to have been delayed and that plaintiff's claims for damages for the value of the shipment have been settled. The court therefore charges the jury that under the law governing this case the plaintiff is not entitled to recover any other or further damage, and directs the jury to render a verdict accordingly."

#### VII.

For that the said Supreme Court of North Carolina erred in overruling the ninth exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's second request to charge the jury as follows:

"2. As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damage claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover any such damage; the jury is therefore directed to render a verdict for the defendant."

#### VIII.

For that the said Supreme Court of North Carolina erred in overruling the tenth exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's third request to charge the jury as follows:

"3. In no view of the evidence in this case is the plaintiff entitled to recover damage for mental suffering or mental anguish on account of the delay of the shipment mentioned in the complaint, and as this action was brought for such mental suffering and mental anguish only, the jury is instructed to render a verdict for the defendant."

#### IX.

For that the said Supreme Court of North Carolina erred in overruling the eleventh exception of the plaintiff

in error and in holding that the trial court committed no error in refusing to give plaintiff in error's fourth request to charge the jury as follows:

"4. The defendant pleads and relies upon the Acts of Congress passed, regulating interstate commerce in this case and asks the court to instruct the jury that under the Acts of Congress regulating interstate commerce and particularly under the Hepburn Act, passed June 29, 1906, by the Congress of the United States, with its amendments, there is no liability on the defendant for the cause of action sued for in this case, and the jury are therefore instructed to render a verdict for the defendant."

#### X.

For that the said Supreme Court of North Carolina erred in overruling the twelfth exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give the plaintiff in error's fifth request to charge the jury as follows:

"5. That attention of the court is expressly called by the defendant to the Acts of Congress of the United States, regulating interstate commerce and said Acts are expressly relied on by the defendant as exempting it from any and all liability in this cause and the court is respectfully requested to instruct the jury that in no view of the evidence in this case is the plaintiff entitled to recover damages for the cause of action alleged in this complaint."

#### XI.

For that the said Supreme Court of North Carolina erred in overruling the thirteenth exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's sixth request to charge the jury as follows:

"6. That the decisions of the United States Court do not recognize the doctrine of mental anguish and that under the law governing this case the plaintiff is not entitled to recover any sum of money whatsoever for mental anguish or mental suffering, and the jury in rendering their

verdict will not take into consideration any such alleged cause of action."

## XII.

For that the said Supreme Court of North Carolina erred in overruling the fourteenth exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's seventh request to charge the jury as follows:

"7. The bill of lading introduced by the plaintiff and issued by the defendant for the shipment mentioned in the complaint in this cause, contains this provision: 'The Company shall not be liable for loss, damage or detention of said property unless a claim therefor shall be presented in writing to its agent at destination office, verified by affidavit accompanied by this contract, within ninety days from the date of the loss, damage, or detention of said shipment,' and the court charges the jury that there is no evidence that any such claim was presented in writing to the defendant or its agent and for that reason the plaintiff is not entitled to maintain this action, and the jury is directed to render a verdict for the defendant."

## XIII.

For that the said Supreme Court of North Carolina erred in affirming the judgment of the Superior Court of Buncombe County, North Carolina, rendered against the plaintiff in error for the sum of two hundred and fifty dollars damages for the causes of action set forth in the complaint.

## XIV.

For that the said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial court, set out in Exception 23 of the plaintiff in error, and reading as follows:

"The court charges you that if you come to the consideration of this third issue, that is, if you have answered the second issue 'yes,' that the defendant was negligent, if you come to the consideration of the third issue as to damages, it becomes your duty to carefully distin-

guish between any suffering, any mental suffering, or mental anguish of the plaintiff which was the result of the death of his wife and her loss to him, and the mental anguish which he suffered as the direct consequence or proximate result of the failure of the casket and other property to arrive in time for this funeral."

#### XV.

For that the said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial court set out in Exception 24 of the plaintiff in error, and reading as follows:

"In other words, it is the mental suffering that he endured, in addition to any suffering and outside of any suffering or distress which was sustained by him on account of the loss of his wife and his grief on that account."

#### XVI.

For that the said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial court set out in Exception No. 25, and reading as follows:

"I charge you further on this third issue, if you come to its consideration, that it is not proper for you to allow any damages against this defendant in the nature of punishment of the defendant to be negligent in the respect alleged in the complaint, yet in this action it would not be proper for you to award any damages by way of punishment of the defendant."

#### XVII.

For that said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial court set out in Exception No. 26 of the plaintiff in error and reading as follows:

"The only damages that are allowable, if you come to the consideration of this third issue, would be such as in your judgment would fairly and justly compensate this plaintiff for the mental anguish which he suffered as the



natural, direct and proximate consequence of the negligence of the defendant."

### XVIII.

For that the said Supreme Court of North Carolina erred in overruling the exception of the plaintiff in error to that portion of the charge of the trial court set out in Exception No. 27 of the plaintiff in error, and reading as follows:

"If you answer the third issue 'yes,' finding that the plaintiff suffered mental anguish, you will then proceed to allow as damages such amount as you may find would reasonably and justly compensate him for such mental anguish, as you may find under the evidence and the charge of the court as I have delivered it to you."

### ARGUMENT.

The principal points involved in this writ of error are, as we conceive, two:

First, That damages for mental anguish disassociated from physical injury, insult or other like treatment of the person, cannot be recovered under the laws of the United States.

Second, If damages for mental anguish are ordinarily recoverable in a case like this, still there can be no recovery in this case because the right of the defendant in error to recover damages was limited by the receipt or contract of shipment to \$50.00, which amount has already been paid.

### DAMAGES FOR MENTAL ANGUISH.

It has been uniformly held by the Federal Courts that damages for mental anguish when disconnected from physical injury cannot be recovered. The cause of action, if the defendant in error had any, necessarily arose under the laws of the United States because the transaction involved was a shipment in interstate commerce. It will be noted that in the opinion of the Supreme Court of

North Carolina, quoted in the record (pp. 41 to 44), the majority of the court, two justices dissenting, held that the cause of action alleged in the complaint was not covered by the United States statutes, the court saying that the statute covers only loss, damage or injury to property.

This Court decided in the case of Adams Express Co. vs. Croninger, 226 U. S., 491, 505, 507, that the legislation of Congress upon the subject of interstate commerce supersedes all regulations or policies of any particular state; that almost every detail of the subject is covered so completely that there can be no doubt that Congress intended to take possession of the subject and supersede all state regulations with reference thereto, and that the proviso in the Carmack Amendment to the Hepburn Act (see 226 U. S., 503), must be construed so as not to conflict with the body of the Act, and that any right or remedy which is reserved to a shipper is a right or remedy under the Federal laws and not under the State laws.

No damages are recoverable for mental anguish arising from the fact that the plaintiff was prevented by the delay in the delivery of a telegram from attending his father's funeral and consoling his mother in her bereavement.

Kester v. Western Union Tel. Co., 55 Fed., 603;  
McBride v. Sunset Telephone Co., 96 Fed., 81.

Referring to the case of Wyman v. Leavitt, 71 Maine, 227, the author of Sutherland on Damages, says: "The court was unable to find any case which held that mental suffering alone caused by simple actionable negligence can sustain an action."

Sutherland on Damages, Vol. 1, Section 95.

Damages for mental suffering caused by the negligence of the defendant, where there was no insult or personal injury involved, cannot be recovered in an action therefor.

White v. Dresser, 135 Mass., 150.

Where there is no physical injury inflicted upon a pas-

senger upon a railroad train, many courts follow the rule that damages for mental pain or suffering, although produced by some negligent act or omission on the part of the carrier, cannot be recovered.

Hutchinson on Carriers, 3rd Ed., Section 1427.

Damages for mental suffering are ordinarily allowable only where there has been a bodily injury causing physical pain or where there has been a malicious, intentional or wilful invasion of the rights of another, and where these elements are lacking damages for mental suffering cannot be recovered.

Rowan v. Western Union Tel. Co., 149 Fed., 550;  
Western Union Tel. Co. v. Burris, 179 Fed., 92.

It was held by the Circuit Court of Appeals, Fourth Circuit, the late Chief Justice Fuller presiding, that in an action against a railroad company for breach of contract for a special train, damages could not be recovered merely for disappointment and mental suffering resulting from delay in departing to reach the bedside of a sick parent.

Wilcox v. Richmond & Danville R. R. Co., 52 Fed., 264.

The Court in that case says, page 267, "But we know of no deciding case which holds that mental pain alone, unattended by injury to the person, caused by simple negligence, can sustain an action. It was said in *Lynch vs. Knight*, 9 H. L., 598, that 'mental pain and anxiety the law cannot value and does not pretend to redress when the unlawful act complained of caused that alone.' "

This case seems to be almost exactly in point.

It is settled in this jurisdiction (Court of Appeals, 8th Circuit), that mental anguish alone, not arising from any physical injury or pecuniary loss, caused by the negligent or other wrongful act of another, is not a basis for an action for damages, in the absence of a statute authorizing such a recovery.

Kyle v. Chicago R. I. & P. Ry. Co., 182 Fed., 614.  
617.

The last named case was an action for damages brought for failure of the defendant carrier to permit the plaintiffs in the case to alight from a train at a station where they desired to alight in order to see a dying man before his death, and was brought for mental suffering in consequence.

A statute of South Carolina making mental anguish caused by the negligent failure of a telegraph company to deliver a telegram, as applied to messages delivered outside of the state, is unconstitutional and void; because, in the first place it is declared to be an attempt by the State of South Carolina to regulate the acts and conduct of parties outside of its jurisdiction; and second, an unlawful interference with interstate commerce.

Western Union Tel. Co. v. Brown, 234 U. S., 542.

In the case just cited, this Court, it seems to us, has practically determined our case. In the Brown case a telegram sent from South Carolina to the plaintiff in the District of Columbia was found by the jury not to have been delivered, by reason of the negligence of the telegraph company. Damages for mental anguish in consequence were recovered in South Carolina. Upon a writ of error this Court reversed the decision of the Supreme Court of South Carolina and held that no recovery could be had, assigning as one reason that the statute of South Carolina was an attempt to regulate commerce among the states. Unquestionably, the decision in our case involves the regulation of commerce among the states and if contrary to the laws of the United States, must be reversed.

#### DAMAGES WERE LIMITED BY THE CONTRACT OF SHIPMENT.

It will be noted that the receipt given by the plaintiff in error for the shipment which was accepted by the defendant in error, limited the shipper's right to recover damages to fifty (\$50.00) dollars. More than the sum of fifty dollars was paid voluntarily by the Express Com-

pany in settlement of the claim for actual loss (Record, p. 23). No further damages are therefore recoverable.

Adams Express Co. v. Croninger, 226 U. S., 491;

M. K. & T. Ry. Co. v. Harriman, 227 U. S., 657,  
672;

Kansas &c. Ry. Co. v. Karl, 227 U. S., 639;

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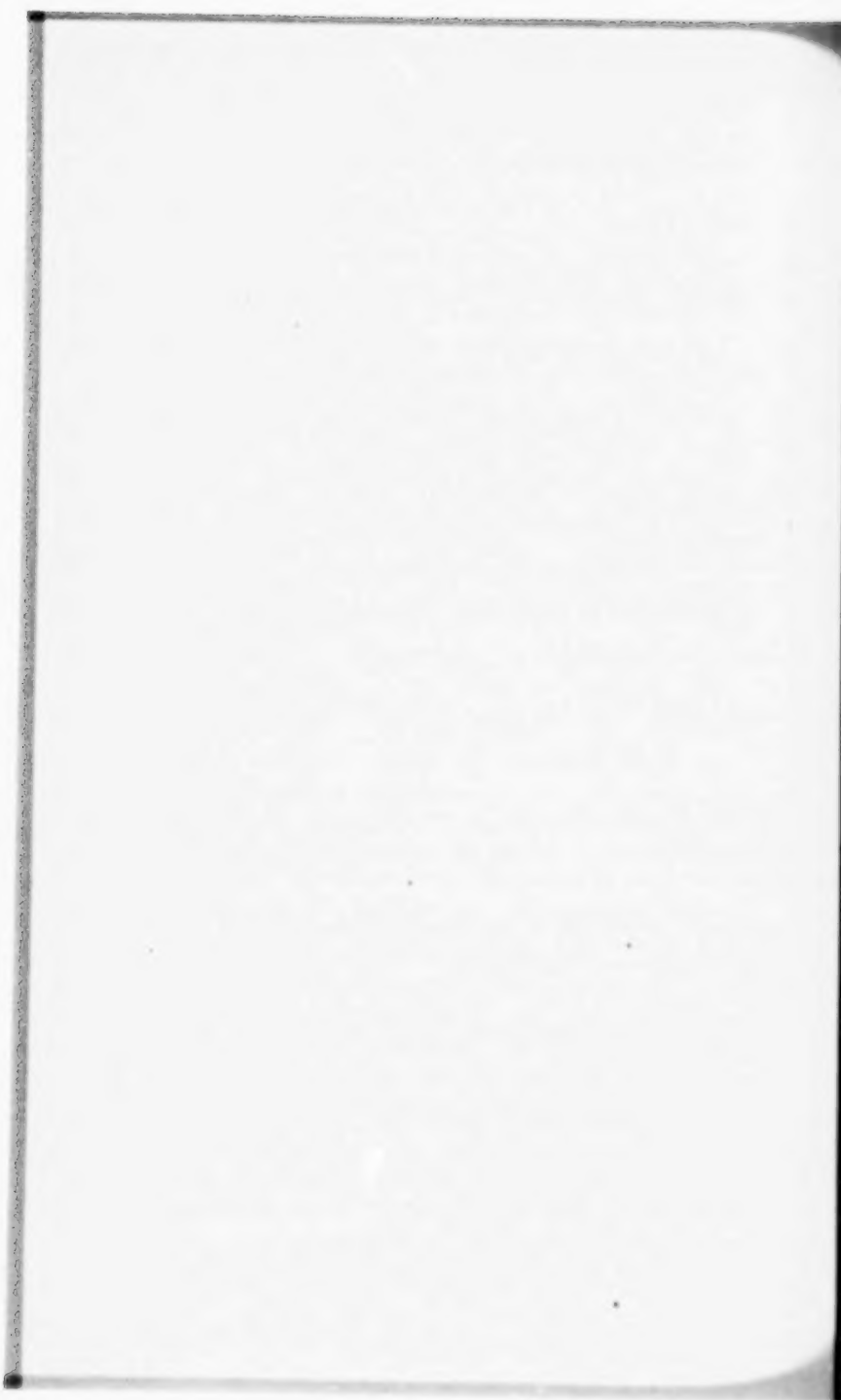
Without going into further detail and without considering each assignment of error separately, we insist that the Court below erred in not sustaining the exceptions and assignments of error of the Express Company, numbers III. to XVIII., inclusive (Record, pp. 3 to 7).

JULIUS C. MARTIN,

THOMAS S. ROLLINS,

GEORGE H. WRIGHT,

Attorneys for Plaintiff in Error.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1915

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No. 201

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**SOUTHERN EXPRESS COMPANY,**

*Plaintiff in Error*

VS.

**JOHN BYERS,**

*Defendant in Error*

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**ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR**

---

JULIUS C. MARTIN,  
Asheville, N. C.  
THOMAS S. BOLLINS,  
Asheville, N. C.  
GEORGE H. WRIGHT,  
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# Supreme Court of the United States

OCTOBER TERM, 1915

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No. 201

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SOUTHERN EXPRESS COMPANY, Plaintiff in Error

VS.

JOHN BYERS, Defendant in Error

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ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

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The assignment of errors and the record present the following propositions:

1

Is the liability of a common carrier for mental anguish growing out of loss, injury or delay of a shipment moving in interstate commerce to be controlled by the law as ascertained and administered by the Federal Judiciary?

2

If the liability of the carrier for mental anguish is to be determined by the law as ascertained and administered by the Federal Judiciary, does that law permit recovery for mental anguish under the conditions set out in this record?

1

**Does the contract of carriage, which provides as follows:**

“In consideration of the rate charged for carrying said property which is regulated by the value and classification thereof and is based upon a valuation of not exceeding fifty dollars for any shipment of one hundred pounds or less, and not exceeding fifty cents per pound for any shipment in excess of one hundred pounds, unless a greater value is declared at time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars (\$50) on any shipment of one hundred pounds or less, and for not exceeding fifty cents per pound on a shipment weighing more than one hundred pounds, and said property is valued at, and the liability of this company is hereby limited to, the value above stated, unless a greater value is declared at the time of shipment, and the charge for value paid or agreed to be paid therefor,”

**operate to exclude liability for mental anguish, the carrier having filed rates and classifications with the Interstate Commerce Commission as required by the Acts of Congress, which rules and classifications are based upon carriage on the contract above mentioned?**

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Other propositions are contained in the record. The plaintiff in error desires to waive all other questions, to the end that these may be determined.

The first and second of propositions may be referred to Assignment of Error No. 1 (Page 2 of the Record), which is as follows:

“1. For that the said Supreme Court of North Carolina held that the receipt given by the plaintiff in error to the defendant in error for the shipment mentioned in the complaint in this cause, in which plaintiff's damages and

right of recovery were limited to fifty dollars, was not binding upon the said defendant in error and over-ruled the objection of the plaintiff in error to the testimony of the defendant in error, as follows:

“I was hardly able to attend to anything on account of the loss of my wife, and I had to do the best I could because I was broke down when I got down there and could not do anything.”

“Q. Did you suffer in body and mind?”

“A. Yes, I suffered in mind and body a great deal.”

“The plaintiff in error insists that this testimony was incompetent and that damages for mental suffering cannot be recovered for delay of an interstate shipment, under the laws applicable thereto,”

and to Assignments Nos. 6, 7, 8, 9, 10 and 11, which are as follows: (Pages 4 and 5 of Record.)

“6. For that the said Supreme Court of North Carolina erred in over-ruling the eighth exception of the plaintiff in error, and in holding that the trial Court committed no error in refusing to give plaintiff in error’s first request to charge the jury as follows:

“1. It is undisputed that the shipment of the casket which it is alleged was delayed, was a shipment in interstate commerce; that is, a shipment from the State of North Carolina to the State of South Carolina. The plaintiff offered a bill of lading herein, containing a provision that the company should not be liable in any event for more than fifty dollars on said shipment. It is admitted that the defendant paid to the plaintiff the full value of the shipment alleged to have been delayed and that plaintiff’s claims for damages for the value of the shipment have been settled. The Court therefore charges the jury that under the

law governing this case the plaintiff is not entitled to recover any other or further damages, and directs the jury to render a verdict accordingly."

"7. For that the said Supreme Court of North Carolina erred in over-ruling the ninth exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give plaintiff in error's second request to charge the jury as follows:

"2. As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damages claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the Court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover any such damage; the jury is therefore directed to render a verdict for the defendant."

"8. For that the said Supreme Court of North Carolina erred in over-ruling the tenth exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give plaintiff in error's third request to charge the jury as follows:

"3. In no view of the evidence in this case is the plaintiff entitled to recover damages for mental suffering or mental anguish on account of the delay of the shipment mentioned in the complaint, and as this action was brought for such mental suffering and mental anguish only, the jury is instructed to render a verdict for the defendant."

"9. For that the said Supreme Court of North Carolina erred in over-ruling the eleventh exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give plaintiff in error's fourth request to charge the jury as follows:

"4. The defendant pleads and relies upon the Acts of Congress passed, regulating interstate commerce in this case and asks the Court to instruct the jury that under the Acts of Congress regulating interstate commerce and particularly under the Hepburn Act, passed June 29, 1906, by the Congress of the United States, with its amendments, there is no liability on the defendant for the cause of action sued for in this case, and the jury are therefore instructed to render a verdict for the defendant."

"10. For that the said Supreme Court of North Carolina erred in over-ruling the twelfth exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give the plaintiff in error's fifth request to charge the jury as follows:

"5. That attention of the Court is expressly called by the defendant to the Acts of Congress of the United States, regulating interstate commerce and said Acts are expressly relied on by the defendant as exempting it from any and all liability in this cause and the Court is expressly requested to instruct the jury that in no view of the evidence in this case is the plaintiff entitled to recover damages for the cause of action alleged in the complaint."

"11. For that the said Supreme Court of North Carolina erred in over-ruling the thirteenth exception of the plaintiff in error and in holding that the trial Court committed no error in refusing to give plaintiff in error's sixth request to charge the jury as follows:

"6. That the decisions of the United States Court do not recognize the doctrine of mental anguish and that under the law governing this case the plaintiff is not entitled to recover any sum of money whatsoever for mental anguish or mental suffering, and the jury in rendering their verdict will not take into consideration any such alleged cause of action."

Proposition No. 3 may be referred to each of the above-mentioned Assignments and also to Assignments Nos. 2, 3 and 4, which are as follows: (See Page 3 of the Record.)

"2. For that the said Supreme Court of North Carolina erred in over-ruling the second exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"A. I was affected on account of that and there was a great deal of talk down there about it and they interrupted me powerful about it, and I was hurt over my wife and about the casket not being there and I had a great many to be there, and it bothered me terribly, I hardly knowed what to do.

"Q. You said that you were interrupted terribly about it, what do you mean by that?

"A. I was bothered about it not being there. I expected it to be there when I got there; that was what I meant.

"Q. What did you mean when you told Mr. Martin that the only mental suffering you had was on account of your wife's death?"

This testimony was objected to upon the same ground as that mentioned in the First Assignment of Error, and plaintiff in error insists that the same was incompetent because its purpose and effect was to add to the defendant's liability as construed by the Supreme Court of North Carolina an additional liability beyond that contemplated by the receipt or bill of lading given by the plaintiff in error to the defendant in error at the date of said shipment.

"3. For that the said Supreme Court of North Carolina erred in over-ruling the objection and exception of the plaintiff in error, number five, and in holding that the schedule of rates filed by the plaintiff in error with Inter-



state Commerce Commission as provided by the Acts of Congress, showing rates of shipment between points in North Carolina and points in South Carolina, was incompetent. The purpose of this evidence was to show that the plaintiff in error had complied with United States statutes in regard to interstate commerce and was entitled to the benefit of said statutes."

"4. For that the said Supreme Court of North Carolina erred in over-ruling the exception of the plaintiff in error to the action of the Court below in refusing the entering of a judgment as of non-suit in the cause, as set out in the sixth exception of the defendant in error."

Others of the Assignments support these propositions, but they are sufficiently supported by the Assignments mentioned.

## BRIEF AND ARGUMENT.

### PROPOSITION No. 1.

In the case of *Adams Express Company v. Croninger*, 226 United States, 491, 505, and those cases which have been adjudged since that time, it appears quite clear that this liability must be determined under the law as ascertained and enforced by the Federal Judiciary. We quote from that decision as follows:

“That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulations with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. *Northern Pacific Ry. v. State of Washington*, 222 U. S., 370; *Southern Railway v. Reid*, 222 U. S., 424; *Mondou v. Railroad*, 223 U. S., 1.

“To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon State regulation, it is evident that

Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.".....  
....."To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal laws at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing State laws, for the latter view would cause the proviso to destroy the act itself."

In *Kansas Southern Railway v. Carl*, 227 U. S., 639, 649, the Court said:

"That amendment [meaning the Carmack Amendment] undoubtedly manifested the purpose of Congress to bring the contracts for interstate shipment under one universal rule and therefore withdraw them from the influence of State legislation."

The Supreme Court of North Carolina, rendering its opinion (by a divided Court) in the case at bar, has not undertaken to find what would be the rulings of the Federal Courts under similar circumstances, but it has contented itself with administering what is declared by it to be the law of North Carolina; which, in all likelihood, is not the law applicable to this subject-matter in any event, for the destination of the shipment was not in North Carolina, but in South Carolina; and the cause of action being the alleged negligent delay of a shipment, the law of the destination State should have been administered, if the liability was not to be determined by the rules of the Federal Judiciary.

See in this connection—

*Slater v. Mexican National Railroad*, 194 U. S., 120, 126.

In that case this Court said:

"But when such a liability (for the wrongful causing of death) is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori* with regard to either its quality or its consequences."

Western Union Telegraph Co. v. Brown, 234 U. S., 542.

In the Croninger Case, *supra*, this Court announced that "Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject."

The Court then quotes from Southern Pacific Co. v. Crenshaw, 5 Ga. App., 675, 687; 63 S. E., 865, 870; showing the great diversity of rulings on this subject.

There is, if possible, more diversity of rulings on the question of mental anguish than on any other subject. The writer of the note in 49 L. R. A. (N. S.) 209, is authority for the statement that "Upwards of six hundred opinions on the doctrine of mental anguish are to be found in the books, and the output does not appear to be decreasing." When it is remembered that the doctrine arose with the So Relle Case, 55 Tex., 308; 40 Amer. Rep., 805, decided in 1881, one is rather astounded at the number of decisions referred to. The question is referred to in Barnes v. Western Union Telegraph Company, 27 Nev., 438; 76 Pac., 931; 65 L. R. A., 696, as "a veritable *questio vexata*."

The Supreme Court of Oklahoma, in Western Union Telegraph Co. v. Chouteau, 28 Okla., 664; 115 Pac. 879; 49 L. R. A. (N. S.) 206, 209, refers to the mental anguish doctrine in telegraph and other cases in the United States, as "A fruitful field of discord."

The same decision is authority for the statement that the conflict in the decisions upon the subject exists not only between the Courts of different States, but the conflict in one instance is exhibited in the decisions of a single State.

The Supreme Court of North Carolina allows mental anguish in telegrams delivered in North Carolina, although originating in a State which does not allow such damages. *Penn v. Western Union Telegraph Company*, 159 N. C., 306; 75 S. E., 16; 41 L. R. A. (N. S.) 222. The same Court also allows recovery for mental anguish for non-delivery of telegrams originating within the State and destined to points without the State. The latter doctrine is based on the measure of damage flowing from the breach of contract. (See concurring opinion of Chief Justice Clarke, in *Penn v. Western Union Telegraph Co.*, *supra*).

The first stated doctrine—that is, when the point of destination is in the State of North Carolina—is sustained because of the breach of duty; so that in the case at bar recovery can be had only because North Carolina holds that in breach of contract mental anguish may be recovered. This doctrine is clearly not the proper measure of damages, as such damages are measured by the law as ascertained and administered by the Federal Judiciary. It gives rise to the possible application of these doctrines to the same transaction:

1. The law as it is administered in North Carolina on contracts.
2. The law as it is administered in the State of destination on tort.
3. The law as administered on this subject by the Federal Judiciary.

If there were need of the Federal Courts taking jurisdiction of the subject of the liability of carriers, because of the conflicting decisions in reference to such liability, insofar as that liability related to physical injury, there is at least as much need for the asserting of that jurisdiction over the claims for mental anguish for the same reason.

We think it quite clear that this subject is to be controlled by the law as ascertained and administered by the Federal Judiciary.

#### SECOND PROPOSITION.

The subject matter of the shipment in this case is alleged to have been a coffin, a shroud, and certain other articles of burial paraphernalia. There was no injury to any of the articles; there was mere delay.

The damages for the delay had been settled.

There was no physical injury to anybody or to anything.

There was no mental pain and suffering accompanied by physical injury of any kind. There was no opportunity for alleged mental suffering to measure the extent of the physical wrong.

"The question as to the liability of a telegraph company for damages for the failure to properly transmit or properly deliver a message is a question of general and not local law, and in the absence of some statute regulating the subject it is the duty of a Court of the United States to decide such general questions independently."

*Western Union Telegraph Co. v. Wood*, 27 Fed. Rep., 471;

*Western Union Telegraph Co. v. Coker*, 61 Fed. Rep., 624;

Felton v. Ballard, 94 Fed. Rep., 781;

Railroad v. Baugh, 149 U. S., 368;

Byrne v. Kansas City, etc., Railroad, 61 Fed. Rep., 605;

Western Union Telegraph Co. v. Sklar, 126 Fed. Rep., 205;

Western Union Telegraph Co. v. Burriss, 179 Fed., 92.

In *Western Union Telegraph Co. v. Wood*, 57 Fed. Rep., 471; 21 L. R. A., 706, *supra*, the United States Circuit Court of Appeals for the Fifth Circuit held:

"Damages for mental anguish resulting from simple negligence in the prompt delivery of a telegram are too uncertain, remote and speculative to be recoverable."

In that case a part of the dissenting opinion of Judge Lurton (afterwards Mr. Justice Lurton) in *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn., 625; 8 S. W., 574, is quoted, the part quoted being as follows:

"The reason why an independent action for such injuries cannot and ought not to be sustained is found in the remoteness of such damages. . . . Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous conditions. The suffering of one under precisely similar circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated or even approximately measured. Easily simulated, and impossible to disprove, it falls within all of the objections to speculative damages which are universally excluded because of their uncertain character. That damages so imaginary or

metaphysical or sentimental shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. But the rule in question has not been limited, as claimed, to actions based upon physical pain. It has, as we have already seen, upon the authority of *Mr. Wood*, been applied to actions of slander and libel. No matter how gross the insult, or how harrowing to the feelings, there can be no recovery if the slander did not imply a crime, or result in some special damage. The same rule applies in actions brought for the death of another. The plaintiff must have a pecuniary interest in such life; and in such cases there can be no recovery for the injured feelings, the grief, or anguish suffered by the plaintiff, in consequence of the death for which the suit lies. This is the rule, regardless of the relation the deceased bore to the plaintiff. Whether husband or wife, or parent or child, the rule is the same. The damages are for the pecuniary loss sustained. . . . . The principles upon which this suit is maintained seem to me so radical a departure from the headlands of the law, and to so seriously threaten the uprooting of doctrines that I have been taught to rever as the very foundation stones of the system of our law, upon the subject of contracts and damages, as to make it my duty to give expression to my views upon the questions involved."

That dissent has been quoted and approved many times.  
See note to 49 L. R. A. (N. S.) 221.

*Chapman v. Western Union*, 88 Ga., 767; 15 S. E., 901.



The Federal Courts have universally refused to sanction recovery against a telegraph company for mental anguish caused by delay in delivering a message, where that is the only ground of damage.

Western Union Telegraph Co. v. Burriss, 179 Fed., 92, 95, *supra*;

Chase v. Telegraph Co., 44 Fed. Rep., 554; 10 L. R. A., 464;

Crawson v. Telegraph Co., 47 Fed. Rep., 544;

Kester v. Telegraph Co., 55 Fed. Rep., 603;

Gahan v. Telegraph Co., 59 Fed. Rep., 433.

In the case of Western Union Telegraph Co. v. Hill, 163 Ala., 18; 50 Sou., 248; 23 L. R. A. (N. S.), 648, 658, the Supreme Court of Alabama undertakes to state the decisions of the Federal Court as follows:

"The Federal Court holds to the rule that such damages are not recoverable in the Federal Court and that the question is one with respect to which such Court will exercise an independent judgment and will not be bound by the holdings of the Courts of the States in which the cases arise."

The subject of mental anguish is treated at great length in a note based upon the case of Western Union Telegraph Co. v. Chouteau, 49 L. R. A. (N. S.) 206. This case is also reported in 28 Okla., 664; 115 Pac., 879. The doctrine that mental anguish independent of physical injury may be recovered is repudiated in the States of Tennessee, Florida, Georgia, Illinois, Indiana, Kansas, Minnesota, Mississippi, Missouri, New York, Ohio, Oklahoma and Virginia. The doctrine was repudiated in Arkansas, South Carolina and Wisconsin, but statutes have been passed in those States allowing such recovery.

That there may be recovery for mental anguish for the non-delivery of freight appears to be entirely subversive of the fundamental principles of the law of damages applicable to the relation of carrier and shipper; and if extended to such relation, it might as well be extended to all the relations of life; and to extend this doctrine is to do away with the theory that pecuniary loss is the measure of liability in such cases.

We have not been able to find that this question has been heretofore presented to this Court. The Court has held that mental pain and suffering may be recovered as an element in determining the measure of the financial injury to one who has received a personal injury, such as having his leg cut off in a railroad accident.

Kennon v. Gilmer, 131 U. S., 22, 26.

But the Court very carefully guards the proposition that mental pain alone is not to be taken into consideration.

In McDermott v. Severe, 202 U. S., 600, 611, the Court was careful to limit recovery for mental suffering to direct and necessary consequences of a physical injury, and quotes from Kennon v. Gilmer, *supra*, clearly meaning that that case should be so understood.

The Gilmer Case has apparently been universally considered in the lower Federal Courts as holding only that damages should be allowed for mental suffering when it is the result of and flows from physical injury.

Tyler v. Western Union Telegraph Co., 54 Fed. Rep., 634, 636;

Western Union Telegraph Co. v. Wood, 57 Fed. Rep., 471, 478.

The same meaning has been attributed to that case by the Supreme Court of Oklahoma.

*Buttner v. Western Union Telegraph Co.*, 2 Okla., 234; 37 Pac., 1087, 1089;

and by the Supreme Court of Florida;

*International Ocean Telegraph Co. v. Saunders*, 32 Fla., 434; 14 Sou., 148;

and by the Supreme Court of West Virginia;

*Davis v. Western Union Telegraph Co.*, 46 W. Va., 48; 32 S. E., 1026, 1028.

We submit that a contrary ruling is not in harmony with either the letter or the spirit of the Federal laws on the subject.

The Acts to regulate commerce, beginning with the Act of 1887, with its various amendments, have shown a clear purpose on the part of Congress to regulate the subject of common carriage in interstate commerce, and to regulate the rates of carriage, and, in many instances, to have those rates based upon the common carrier's ultimate liability in the event of loss or delay. To sustain the doctrine that imaginary sums may be recovered for the intangible thing called "mental anguish" will be to completely upset the principles of regulation and of rate-making which have been established as to many kinds of common carriers and as to all kinds of common carriage by express.

We believe that it may be accepted that the decisions authorize and the conditions require the holding that the question should be determined, as to interstate shipments, by the law as ascertained by the Federal Judiciary; and that this law as so ascertained does not support, but precludes, such recovery.

THE CONTRACT OF CARRIAGE IS INCONSISTENT WITH THE  
CONCEPTION THAT MENTAL DAMAGES MAY BE ALLOWED.

It is unnecessary to refer to the case of *Adams Express Company v. Croninger*, 226 U. S., 491, and those cases which have followed since that time, for the purpose of sustaining this position.

The rates of an express company are based upon value, and as a measure of insurance against the amount which may be ultimately recovered by the shipper or consignee. This idea pervades the whole fabric of the rate structure. If recovery is to be allowed for mental anguish, then this theory of rate making is to be upset, and especially if this is to be allowed in suits on contracts. The extent of the liability on account of the shipment is set out in the contract, which amount may be increased or decreased, the shipper declaring the amount and paying the rate thereon. To permit a recovery for mental anguish not only violates the canons of construction of the common law, but it would permit the upsetting of the rate structure, and of the laws of Congress providing for the rate structure of express companies. It would upset those provisions of the Act to regulate Commerce against unjust discrimination.

It is very much the same as was held in *Pierce Co. v. Wells Fargo Co.*, 236 U. S., 278, 286:

"If a recovery for full value were to be permitted in this case, the shipper itself would obtain an undue advantage in recovering such value, when it had purposely and intentionally taken the risk of less responsibility from the carrier for a lower rate. Such result would bring about the very favoritism which it is the purpose of the Commerce Act to avoid."

Furthermore, the doctrine would violate the rule that damages, for detention of property will not be allowed in excess of the value of the property.

Telfair County v. Webb, 119 Ga., 916; 47 S. E., 218;

Atlanta Ice & Coal Co. v. Mixon, 126 Ga., 457; 55 S. E., 237.

For the reasons set out in the original brief, and in this supplemental one, the reversal of this case is respectfully urged.

Respectfully submitted,

#### ADDENDUM

Since the foregoing brief was dictated, the case of Cleveland, Cincinnati, Chicago & St. Louis Railroad v. Dettlebach, 239 U. S., 588, decided January 10, 1916, and reported in Official Advance Sheets dated January 20, 1916, has come to the attention of this writer. There the agreed valuation is held to apply not only to the goods while they are in transit, but also to fix the responsibility of the carrier

as warehouseman while it is holding the goods in storage after arrival at destination and notice to the consignee. The Court comments upon the meaning of the term "transportation," and shows that, under the terms of the Hepburn Act, "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful," so that every service rendered or to be rendered in the transportation of property or in connection therewith is under the jurisdiction of the Act of Congress.

The decision further holds that whether or not the relation of carrier had ended and warehouseman begun is a Federal question.

It is a fair deduction from the opinion that the effect of a contract of carriage for interstate transportation is to be determined in the light of the Act of Congress regulating the matter and that such questions are Federal in their nature. (See pages 592 and 593.) If this be true, the liability of the carrier for mental anguish growing out of the delay in transportation of an interstate shipment is a Federal question; and especially is this true when the State of North Carolina based its opinion upon the *contract* of carriage, and did not undertake to apply the law of the place where the delay occurred. It manifestly undertook to apply only the law of the State of origin, and its excuse for applying that law is the power which it claimed to construe the *contract* according to its law rather than according to the Federal law.

Manifestly, if the rate is to bear a relation to liability and the rate is fixed by Federal authority, liability should be ascertained by the same power.